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# Provisional application of treaties

## Memorandum by the Secretariat

*Summary*

Article 25 of the Vienna Convention on the Law of Treaties provides for the possibility of the application of treaties on a provisional basis. Its origins lie in proposals for a provision recognizing the practice of the "provisional entry into force" of treaties, made by Special Rapporteurs Gerald Fitzmaurice and Humphrey Waldock during the consideration by the International Law Commission of the law of treaties. The provision, which was included in the 1966 articles on the law of treaties as article 22, was amended at the Vienna Conference on the Law of Treaties by, inter alia, substituting the concept of provisional "application" for "entry into force". The present memorandum traces the negotiating history of the provision both in the Commission and at the Vienna Conference, and provides a brief analysis of some of the substantive issues raised during its consideration.

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# I. Introduction

1. At its sixty-fourth session, held in 2012, the International Law Commission included the topic "provisional application of treaties" in its programme of work. At that session, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties.[1]

2. The present memorandum provides, in section II below, a description of the procedural history of the consideration by the International Law Commission of what it called the "provisional entry into force" of treaties, as well as of the negotiation, at the 1968-69 Vienna Conference on the Law of Treaties, of article 25 of the 1969 Vienna Convention on the Law of Treaties:[2]

> Provisional application
>
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

3. Section III below contains a description of some of the substantive issues raised during the discussions in the Commission, as well as during the negotiations at the Vienna Conference.

# II. Procedural history

4. The topic "law of treaties" was among those selected by the International Law Commission in 1949 for codification, and was subsequently considered by the Commission at its second to eighteenth sessions, from 1950 to 1966, during which time four successive Special Rapporteurs were appointed.[3] Following an initial consideration of the topic, on the basis of Special Rapporteur James L. Brierly's first and second reports,[4] submitted in 1950 and 1951, respectively, the Commission next held a substantive discussion of the topic in 1959, on the basis of the first report of Gerald Fitzmaurice,[5]

[1] A/67/10, para. 143.

[2] United Nations, *Treaty Series*, vol. 1155, p. 331.

[3] James L. Brierly (in 1949), Hersch Lauterpacht (in 1952), Gerald Fitzmaurice (in 1955) and Humphrey Waldock (in 1961).

[4] A/CN.4/23 and A/CN.4/43, respectively.

[5] A/CN.4/101.

which he had submitted in 1956.[6] The Commission took a further hiatus from the topic in order to concentrate its efforts on other topics, and returned to its consideration of the law of treaties at its fourteenth to eighteenth sessions, from 1962 to 1966, which it undertook on the basis of six reports submitted by Humphrey Waldock,[7] who had since been appointed to replace Mr. Fitzmaurice as Special Rapporteur for the topic. It was on the basis of Mr. Waldock's reports that the Commission completed the first (in 1964) and second (in 1966) readings of the draft articles on the law of treaties,[8] which it adopted in 1966.

5. The 1966 draft articles on the law of treaties included draft article 22, entitled "Entry into force provisionally", which read as follows:

> 1. A treaty may enter into force provisionally if:
>
> (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or
>
> (b) The negotiating States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.

## A. International Law Commission, 1950 to 1966

### 1. Consideration at the second to sixth sessions, 1950 to 1954

6. Mr. Brierly and Hersch Lauterpacht dealt only with the question of the "provisional entry into force" of a treaty, indirectly (in the case of the former) or as part of the broader question of ratification (in that of the latter). In his proposal for an article 5 (entitled "When ratification is necessary"), submitted in 1951, Mr. Brierly envisaged several scenarios in which a State would not be deemed to have undertaken a final obligation under the treaty until it ratified that treaty.[9] The provision was subsequently recast to deal with the legal effect of signature prior to ratification and was adopted that year, on a preliminary basis, as article 4, which envisaged the possibility of a State being deemed to have undertaken a final

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[6] While the Commission did not consider Mr. Brierly's third report (A/CN.4/54 and Corr.1) or the two reports presented by Hersch Lauterpacht (A/CN.4/63 and A/CN.4/87 and Corr.1, respectively), owing to a lack of time and to postponement following the resignation of both Rapporteurs, both Gerald Fitzmaurice and Humphrey Waldock drew on the reports of their predecessors when developing their own proposals, and the positions taken by both Mr. Brierly and Mr. Lauterpacht were referred to on numerous occasions during the discussions within the Commission in later years. Likewise, owing to lack of time, the Commission was unable to consider Mr. Fitzmaurice's second to fifth reports, submitted in 1957 to 1960 (A/CN.4/107, A/CN.4/115 and Corr.1, A/CN.4/120 and A/CN.4/130), respectively. Nonetheless, those reports were referred to extensively by Mr. Waldock.

[7] A/CN.4/144 and Add.1, A/CN.4/156 and Add.1-3, A/CN.4/167 and Add.1-3, A/CN.4/177 and Add.1 and 2, A/CN.4/183 and Add.1-4, and A/CN.4/186 and Add.1-7, respectively.

[8] *Yearbook of the International Law Commission*, 1966, vol. II, p. 177.

[9] See A/CN.4/43.

obligation by its signature of a treaty "if the treaty provides that it shall be ratified but that it shall come into force before ratification".[10]

7. An early direct reference to the provisional entry into force of a treaty was made by J. P. A. François, in 1951, when he called on the Commission

> to consider the imaginary case of a treaty between two States which had been signed and ratified by both parties. The Heads of State had exchanged the instruments of ratification. Provisionally the treaty was in force.[11]

8. In his first report, submitted in 1953, Mr. Lauterpacht, in his proposal for article 6, on ratification, anticipated the possibility of a treaty expressly providing for entry into force prior to ratification.[12]

### 2. Consideration at the eighth to twelfth sessions, 1956 to 1960

9. Although Mr. Fitzmaurice submitted five reports, the Commission was able to consider only parts of his first report (in 1959), in which he proposed a set of 42 draft articles, focusing primarily on the framing, conclusion and entry into force of treaties.

10. The Special Rapporteur's proposal for article 42 (Entry into force (legal effects)), indicated, in its paragraph 1:

> A treaty may ... provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable.[13]

The commentary to the provision simply stated that it covered the case of provisional entry into force and stated the rule applicable in case this situation became unduly prolonged.[14]

11. While the proposal was never discussed by the Commission, passing references to the possibility of the provisional entry into force of a treaty were made during the debate held in 1959. For example, in the context of the discussion on the general conditions for the obligatory force of treaties, Milan Bartoš suggested that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification[15] and that there were valid practical

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[10] See A/CN.4/L.28. A revised version of the provision, with commentary thereto, was subsequently included (as article 6) in Mr. Brierly's third report, submitted in 1952, which reproduced the articles tentatively adopted by the Commission at its second and third sessions, in 1950 and 1951. However, owing to the resignation of the Special Rapporteur, the Commission never debated that report.

[11] A/CN.4/SR.88, para. 37.

[12] A/CN.4/63, article 6 (2) (b) ("2. In the absence of ratification a treaty is not binding upon a Contracting Party unless:

...

"(b) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification").

[13] See A/CN.4/101.

[14] Ibid., para. 106.

[15] A/CN.4/SR.487, para. 37.

considerations for the inclusion of a clause concerning the provisional entry into force of treaties.[16]

### 3. Consideration at the fourteenth session, 1962

12. The provisional entry into force of treaties was dealt with by Mr. Waldock in his first report,[17] which was considered in 1962. The concept was introduced in paragraph 6 of his proposal for article 20 (Mode and date of entry into force):

> a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this article.[18]

13. The Special Rapporteur explained that paragraph 6 sought to cover what in modern practice was a not infrequent phenomenon — a treaty brought into force provisionally, pending its full entry into force when the required ratifications or acceptances had taken place.[19] He noted that a treaty clause having this effect was, from one aspect, a clause relating to a mode of bringing a treaty into force.[20] The Commission focused on other aspects of article 20,[21] with only passing reference made to paragraph 6.

14. Mr. Waldock's proposal for article 21, dealing with the legal effects of the entry into force of a treaty, also included the following reference to the effects of provisional entry into force:

> 2. (a) When a treaty lays down that it shall come into full force provisionally upon a certain date or event, the rights and obligations contained in the treaty shall come into operation for the parties to it upon that date or event and shall continue in operation upon a provisional basis until the treaty enters into full force in accordance with its terms.
>
> (b) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis, any of the parties may give notice of the termination of the provisional application of the treaty; and when a period of six months shall have elapsed, the rights and obligations contained in the treaty shall cease to apply with respect to that party.[22]

15. The discussion on paragraph 2 focused on subparagraph (b), which the Special Rapporteur had proposed *de lege ferenda*. After several doubts had been expressed regarding the advisability of including the provision,[23] the Special Rapporteur withdrew it and the Commission referred subparagraph (a) to the Drafting Committee.[24] The Commission had earlier accepted a procedural proposal by the Special Rapporteur that article 20, paragraph 6, be considered by the Drafting

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[16] Ibid., para. 40.
[17] A/CN.4/144 and Add.1.
[18] Ibid.
[19] Ibid., para. (7) of the commentary to article 20.
[20] Ibid.
[21] See A/CN.4/SR.656 and 657.
[22] See A/CN.4/144 and Add.1.
[23] See the discussion on the termination of the provisional application of treaties in paras. 85 to 108 of the present memorandum.
[24] A/CN.4/SR.657, paras. 12-18.

Committee together with article 21, paragraph 2, with a view to being included in an article 19 bis, which would contain all the provisions on the rights and obligations of States prior to the entry into force of the treaty.[25]

16. The Drafting Committee, however, adopted a narrower article 19 bis (renumbered as article 17) limited to the general obligation of good faith prior to the entry into force of a treaty. In introducing that article, the Special Rapporteur recalled that, in the course of the discussion of various articles, it had been suggested that particular points should be transferred to article 19 bis. One of those points was the question of provisional entry into force. The Drafting Committee had decided, however, that that question should be dealt with in the articles concerning entry into force.[26]

17. The Drafting Committee's subsequent proposal for a revised article 20 (entitled "Entry into force of treaties") no longer included a reference to provisional entry into force.[27] The issue was, instead, entirely subsumed in its proposal for a revised article 21 (entitled "Provisional entry into force"), which read as follows:

> A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.[28]

The Commission adopted the article, on first reading, in the form proposed, as (renumbered) article 24.

18. "Provisional entry into force" was also referred to during the consideration of other articles that year. Several members discussed the provisional entry into force of treaties in the context of article 9 (Legal effects of a full signature), in particular the reference in paragraph 2, subparagraph (c), to the obligation of good faith on the part of a signatory State, and paragraph 2, subparagraph (d), concerning the right of the signatory State to insist on the performance of other signatories.[29] Reference was also made in the commentary to article 12 (Ratification), as adopted in 1962, in which it was noted, "It may not be very often that a treaty expressed to come into force upon signature is made subject to ratification; but this does sometimes happen in practice when a treaty which is subject to ratification is expressed to come into force provisionally upon signature."[30]

### 4. Consideration at the fifteenth and sixteenth session, 1963 and 1964

19. Mr. Waldock's second and third reports did not revisit the concept of the "provisional entry into force of treaties" directly. Nonetheless, his second report dealt with, inter alia, the question of constitutional limitations on the validity of

[25] Ibid., para. 3.
[26] A/CN.4/SR.661, para. 2.
[27] A/CN.4/SR.668, para. 34.
[28] Ibid., para. 37.
[29] A/CN.4/SR.643, paras. 86-87, and A/CN.4/SR.644, paras. 69 and 87.
[30] *Yearbook of the International Law Commission, 1962*, vol. II, p. 173, para. (8) of the commentary to article 12.

treaties, including those not yet in force.[31] The report also considered the question of the termination of a treaty, which would ex hypothesi also terminate the provisional entry into force of the treaty.

20. A passing reference was made in the third report, in which, in the discussion on article 57 (Application of treaty provisions *ratione temporis*), it was indicated, inter alia, that the rights and obligations created by a treaty could not come into force until the treaty itself was in force, either definitively or provisionally under article 24.[32]

### 5. Consideration at the seventeenth session (first part), 1965

21. Article 24 was considered again in 1965, in the context of the second reading of the articles on the law of treaties. The Commission had before it Mr. Waldock's fourth report,[33] which contained an analysis of comments and observations received from Governments, together with his suggestions for amendments. Japan noted that the technique of provisional entry into force was in fact sometimes resorted to as a practical measure, but the precise legal nature of such provisional entry into force did not seem to be very clear unless its legal effect could be precisely defined, it seemed best to leave the matter entirely to the intention of the contracting parties. Provisions of article 23, paragraph 1, could perhaps cover this eventuality.[34] Such sentiments were echoed by the United States of America, which took the view that while the article accorded with present-day requirements and practices, it might be questioned whether such a provision in a convention on treaties was necessary.[35] Sweden, and later the Netherlands, commented on substantive aspects of the provision.[36]

22. In response, the Special Rapporteur recalled that the Commission had considered that "provisional entry into force" occurred in modern treaty practice with sufficient frequency to require notice in the draft articles, and it seemed desirable for the legal character of that situation to be recognized in the draft articles, lest the omission be interpreted as denying it.[37] He added that leaving the matter to the application of the general rule in article 23, paragraph 1 (on entry into force of a treaty), would not cover the problem altogether, as the States concerned sometimes brought about the "provisional entry into force" by a separate agreement in simplified form."[38]

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[31] See A/CN.4/156 and Add.1-3, proposal for article 5 (Constitutional limitations on the treaty-making power).

[32] A/CN.4/167 and Add.1-3, para. (2) of the commentary to article 57.

[33] A/CN.4/177 and Add.1 and 2.

[34] See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

[35] Ibid.

[36] Ibid. References to the provisional entry into force of treaties were also made in the comments by Luxembourg on article 12 (Ratification) and by Cyprus and Israel in relation to the applicability of article 55 (*Pacta sunt servanda*) (ibid.).

[37] A/CN.4/177 and Add.1, article 24, observation of the Special Rapporteur, para. 1.

[38] Ibid.

23. The second-reading debate on article 24[39] was held on the basis of a revised version proposed by the Special Rapporteur.[40] While different opinions were expressed, in particular as to how the question of the termination of the provisional entry into force was dealt with, the Commission decided to retain a distinct provision in the draft articles.[41] The Commission also debated a proposal by Paul Reuter to refer to the provisional "application" of a treaty, as opposed to its provisional "entry into force".[42]

24. On 2 July 1965, the Commission adopted, by a vote of 17 to none, article 24, as follows:[43]

> 1. A treaty may enter into force provisionally if:
>
> (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or
>
> (b) The contracting States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.

### 6. Consideration at the eighteenth session, 1966

25. Article 24 was next referred to the following year, in Mr. Waldock's sixth report,[44] in the context of its relationship with articles 55 (*Pacta sunt servanda*)[45] and 56 (Application of a treaty in point of time), primarily in response to a set of comments received from the Government of Israel.

26. The Commission returned to the consideration of article 24 during the adoption of the final draft articles on the law of treaties. While a suggestion by Shabtai Rosenne to reverse the order of articles 23 and 24[46] was not adopted, the

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[39] Provisional entry into force was also referred to in the debate on other articles. In connection with article 12, see the statements of Abdullah El-Erian (A/CN.4/SR.784, para. 86), Antonio de Luna (A/CN.4/SR.785, para. 69) and Roberto Ago (ibid., para. 81). The practice was also referred to by Paul Reuter, in the context of article 17, concerning the rights and obligations of States prior to the entry into force of the treaty (A/CN.4/SR.788, para. 36).

[40] The proposal for a revised text was as follows: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it" (A/CN.4/SR.790, para. 73).

[41] However, Taslim Olawale Elias opposed the retention of article 24, since the issue appeared to be covered by paragraphs 1 and 3 of article 23 (ibid., para. 84). See also the views of Senjin Tsuruoka (A/CN.4/SR.791, paras. 9-10, 12 and 26). While José Maria Ruda expressed his sympathy for such views, he nonetheless supported the retention of the article for practical reasons (A/CN.4/SR.790, para. 85).

[42] A/CN.4/SR.790, para. 75. See the discussion in paras. 48 and 49 of the present memorandum.

[43] An earlier version proposed by the Drafting Committee was sent back (A/CN.4/SR.814, paras. 38-56).

[44] A/CN.4/186 and Add.1-7.

[45] See the discussion in paras. 75 and 76 of the present memorandum.

[46] A/CN.4/SR.886, para. 63.

Commission accepted the Drafting Committee's proposal that the words "negotiating States" be substituted for the words "contracting States" in paragraph 1, subparagraph (b).[47] With that final amendment, article 24 (subsequently renumbered as article 22) was adopted, on second reading. The Commission also adopted a commentary containing four paragraphs, dealing with the two recognized bases for provisional entry into force (i.e., in accordance with the terms of a provision in the treaty itself or on the basis of a separate agreement), the practice of bringing into force provisionally only a certain part of a treaty, and an explanation of the decision to exclude reference to the termination of provisional entry into force.[48]

## B. General Assembly, 1966 and 1967

27. Upon receiving the report of the International Law Commission, the General Assembly, at its twenty-first session, in 1966, decided, in its resolution 2166 (XXI), to invite the submission of written comments and observations on the draft articles. Of those member Governments submitting such comments and observations, only Belgium commented on article 22 (focusing on the mode of termination of provisional entry into force).[49] At the twenty-second session of the Assembly, in 1967, during the debate on the law of treaties, the delegation of Sweden referred, with approval, to the Belgian comment.[50]

## C. Vienna Conference on the Law of Treaties, 1968 and 1969

28. The United Nations Conference on the Law of Treaties was held in Vienna, in two sessions, from 26 March to 24 May 1968 and from 9 April to 22 May 1969, respectively.

### 1. Consideration at the first session, 1968

29. Draft article 22 was first considered by the Committee of the Whole of the Conference,[51] which had before it 10 proposals for amendments.[52] A proposal to delete the article was not pressed by the sponsors.[53] A number of drafting proposals were referred to the Drafting Committee. Two proposals to delete paragraph 2 were rejected.[54] A proposal to refer to the provisional "application", as opposed to the "entry into force", of treaties was adopted.[55] The Committee of the Whole

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[47] A/CN.4/SR.887, para. 69.

[48] *Yearbook of the International Law Commission, 1966*, vol. II, p. 210. See also para. (3) of the commentary to article 23 (*Pacta sunt servanda*), previously article 55 ("The words 'in force' of course cover treaties in force provisionally under article 22", p. 211).

[49] A/6827 and Corr.1, p. 6. See also, para. 95 of the present memorandum.

[50] *Official Records of the General Assembly, Twenty-second Session*, Sixth Committee (Legal Questions), 980th meeting, para. 13.

[51] At its 26th and 27th meetings, held in April 1968 (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, pp. 140-146).

[52] Ibid., vol. III, Report of the Committee of the Whole, paras. 222-230.

[53] Proposal by the Republic of Korea, the Republic of Viet Nam and the United States of America (see A/CONF.39/C.1/L.154 and Add.1).

[54] By 63 votes to 11, with 12 abstentions (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 227 (a)).

[55] By 72 votes to 3, with 11 abstentions (ibid., para. 227 (b)).

approved, in principle, two proposals to include a new paragraph, on the termination of the provisional entry into force or provisional application of a treaty.[56]

30. With the aforementioned understanding and decisions, the article was referred to the Drafting Committee, which subsequently proposed the following revised text for article 22:[57]

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

31. In introducing the revised text, the Chair of the Drafting Committee pointed out that the article reflected a modified version of the proposal by Czechoslovakia and Yugoslavia for the chapeau to paragraph 1, including the reference to the "provisional application" of treaties. The concept of the provisional application of part of a treaty, previously set out in paragraph 2, had been incorporated into paragraph 1. New paragraph 2 reintroduced the issue of the termination of the provisional application of a treaty. All other proposals were rejected by the Drafting Committee. The Committee of the Whole adopted article 22, as proposed by the Drafting Committee, without a vote.[58]

#### 2. Consideration at the second session, 1969

32. The report of the Committee of the Whole on draft article 22 was taken up in the plenary of the Conference at the second session. The Conference adopted article 22 by 87 votes to 1, with 13 abstentions.[59] Article 22 was renumbered as article 25 of the Convention on the Law of Treaties.

## III. Substantive issues discussed during the development of article 25

### A. Raison d'être of provisional application of treaties

33. As early as in 1953, when Mr. Lauterpacht referred to the existence of a treaty which, "while providing that it shall be ratified, provides also that it shall come into force prior to ratification",[60] a common theme in the reports of the Special

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[56] By 69 votes to 1, with 20 abstentions (ibid. para. 227 (c)).

[57] Ibid., vol. I, 72nd meeting of the Committee of the Whole, p. 426.

[58] Ibid., p. 427.

[59] Ibid., vol. II, 11th plenary meeting, para. 101. The Drafting Committee subsequently rejected several proposals to modify article 22, raised during the debate immediately prior to its adoption, as well as a proposal by Yugoslavia to include a new article (see para. 79 of the present memorandum). Ibid., 28th plenary meeting, paras. 45-47.

[60] A/CN.4/63, article 6 (2) (b).

Rapporteurs and in the debate in the Commission was the extent to which this phenomenon was common in the practice of States. Mr. Lauterpacht noted that there were frequent examples of this type of treaty.[61]

34. During the debate on the first report by Mr. Fitzmaurice,[62] held in 1959, Mr. Bartoš suggested that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification.[63] He reiterated the suggestion in 1962, when he referred to the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification.[64]

35. In the commentary to his proposal for article 20, paragraph 6, Mr. Waldock alluded to a modern practice which was a not infrequent phenomenon: a treaty brought into force provisionally, pending its full entry into force.[65] The commentary to (renumbered) article 24, adopted by the Commission in 1962, stated: "This article recognizes a practice which occurs with some frequency today and requires notice in the draft articles".[66]

36. In 1965, Grigory Tunkin considered article 24 to be descriptive of an existing practice rather than expressive of a rule of law. His own experience showed that it was not uncommon for a bilateral treaty to be subject to ratification but to enter into force immediately upon signature.[67] The Special Rapporteur subsequently noted that the Commission as a whole appeared to be firmly of the opinion that it was dealing with a common phenomenon which had become an ordinary part of existing treaty practice.[68]

37. These views were echoed at the Vienna Conference.[69] Venezuela expressed the view that entry into force provisionally corresponded to a widespread practice and that provisional application met real needs in international relations.[70] A number of

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[61] Ibid., para. 5 (b) of the comment to article 6 (2) (b). Specific examples were cited in the statements by Mr. Briggs in 1962 (A/CN.4/SR.644, para. 87), Mr. El-Erian in 1965 (A/CN.4/SR.790, para. 98), Mr. Bartoš in 1965 (A/CN.4/SR.791, para. 23) and Mr. Pessou in 1965 (A/CN.4/SR.791, para. 31), as well as in the statement by Venezuela at the first session of the Vienna Conference in 1968 (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 29).

[62] See A/CN.4/101. In his commentary to article 42 (1), the Special Rapporteur simply noted, "This covers the case of provisional entry into force" (para. 106).

[63] A/CN.4/SR.487, para. 37.

[64] A/CN.4/SR.643, para. 86. See also A/CN.4/SR.647, para. 97.

[65] A/CN.4/144 and Add.1, para. (7) of the commentary to article 20.

[66] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

[67] A/CN.4/SR.791, para. 28.

[68] Ibid., para. 55.

[69] See also the view expressed by Mr. Waldock, in his capacity as Expert Consultant to the Vienna Conference, that the practice of provisional application was now well established among a large number of States. See *Official Records of the United Nations Conference on the Law of Treaties*, vol. II, 11th plenary meeting, para. 89.

[70] Ibid., vol. I, 26th meeting of the Committee of the Whole, paras. 29 and 31. However, see also the view of Bulgaria that article 22 involved a situation which seldom arose (ibid., para. 59).

delegations opposed a proposal to delete the article on the grounds that it reflected existing practice.[71]

38. The need to expedite the application of a treaty, typically as a matter of urgency, was the common justification offered for the practice. In 1959, Mr. Bartoš referred to the valid practical considerations for the inclusion of a clause,[72] and Georges Scelle was prepared to admit it in some very exceptional cases, e.g., customs agreements intended essentially for the immediate protection of a country's economy.[73] The commentary to article 24, adopted in 1962, stated: "Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may provide in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally".[74] Abdullah El-Erian, in 1965, shared this understanding when he stated that the inclusion of a clause on provisional entry into force in a treaty served a useful purpose where the subject matter was urgent, the immediate implementation of the treaty was of great political significance, or it was psychologically important not to wait for completion of the lengthy process of compliance with constitutional requirements.[75]

39. At the Vienna Conference, Venezuela noted that the practice was based on the urgency of certain agreements.[76] Romania stated that the practice of applying treaties provisionally arose in cases where immediate application was necessitated by the urgency of the content of the treaty.[77] Malaysia observed that the advantages of the treaty could be obtained much sooner.[78] Austria noted that the closely knit structure of international relations might require the immediate application of a treaty.[79] Costa Rica was of the view that the practice should be commended on grounds of flexibility.[80] Italy noted that the purpose of article 22 was, inter alia, to provide the necessary element of flexibility to regulate present international treaties.[81] Similarly, the Expert Consultant (Mr. Waldock) recalled that provisional application was typically resorted to in two situations: (a) when, because of a certain urgency in the matter at issue, particularly in connection with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future; and (b) when it was not so much a question of urgency as that the matter was regarded as manifestly highly desirable and almost certain to obtain parliamentary approval.[82]

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[71] See the comments of Israel (ibid., para. 44), France (ibid., para. 45), Switzerland (ibid., para. 46), the United Kingdom of Great Britain and Northern Ireland (ibid., para. 48), Cambodia (ibid., 27th meeting of the Committee of the Whole, para. 4), Romania (ibid., para. 5), Italy (ibid., vol. II, 11th plenary meeting, para. 83) and Poland (ibid., para. 87).

[72] A/CN.4/SR.487, para. 40.

[73] Ibid., para. 41.

[74] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

[75] A/CN.4/SR.790, para. 96; see also the example referred to in para. 98.

[76] *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 29.

[77] Ibid., 27th meeting of the Committee of the Whole, para. 5.

[78] Ibid., para. 7.

[79] Ibid., vol. II, 11th plenary meeting, para. 59.

[80] Ibid., para. 67.

[81] Ibid., para. 83

[82] Ibid., para. 89.

40. Another reason cited pertained to considerations of domestic law. For example, Sweden noted that provisional application was provided for because there was often no absolute assurance that the outcome of internal constitutional procedures would confirm the provisional acceptance of the treaty.[83] Antonio de Luna had, in 1965, alluded to this when he noted that the method referred to in article 24 was a much more elegant means of overcoming the difficulties raised by constitutional requirements for ratification than the method of using a special terminology so as to avoid the terms "treaty" and "ratification".[84] At the same session, Mr. Bartoš observed that if a treaty was applied only provisionally, most legal systems would regard that situation as a practical expedient which did not introduce the rules of international law into internal law.[85]

41. Several delegations at the Vienna Conference were of the same view. For example, Yugoslavia considered the article to be useful legally.[86] Romania observed that provisional application satisfied the actual requirements of States by setting up machinery through which delays in ratification, approval or acceptance could be avoided.[87] Malaysia noted that it was often expedient to avoid the unnecessary delay entailed by going through the traditional channels.[88]

42. However, a number of delegations expressed doubts precisely for reasons of compliance with domestic law. For example, Viet Nam noted that States might commit themselves hastily under the pressure of circumstances without weighing all the difficulties that the subsequent ratification of their commitments might encounter.[89] Venezuela observed that Governments hesitated to commit themselves without complying with the procedure prescribed by internal law unless they were certain that ratification would not give rise to any political difficulty.[90] Greece stated that the provisions of article 22 could lead to a conflict between international law and the constitutional law of a State and thereby give rise to delicate situations.[91] Several delegations, however, observed that the solution for States facing constitutional difficulties was not to conclude treaties containing clauses permitting their provisional application.[92] The Expert Consultant expressed surprise at the degree of anxiety, since to him the article seemed to offer a protection to the constitutional position of certain States rather than the contrary, because there was no need for the State concerned to resort to the procedure of provisional application at all.[93]

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[83] See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

[84] A/CN.4/SR.790, para. 92.

[85] A/CN.4/SR.791, para. 21. See also the comment of Eduardo Jiménez de Aréchaga that it was because of the constitutional difficulties which sometimes delayed ratification that he considered article 24 particularly useful (ibid., para. 50).

[86] *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 28.

[87] Ibid., 27th meeting of the Committee of the Whole, para. 5.

[88] Ibid., para. 7.

[89] Ibid., 26th meeting of the Committee of the Whole, para. 26.

[90] Ibid., para. 30. See also the comments of Switzerland (ibid., para. 46), the United States (ibid., para. 51) and Malaysia (ibid., 27th meeting of the Committee of the Whole, para. 7).

[91] Ibid., vol. II, 11th plenary meeting, para. 73.

[92] See the statements of Uruguay (ibid., para. 78), Canada (ibid., para. 80), Italy (ibid., para. 84), Colombia (ibid., para. 86), Poland (ibid., para. 87) and Uganda (ibid., para. 92).

[93] Ibid., paras. 89 and 90.

43. Guatemala,[94] Costa Rica,[95] Cameroon[96] and Uruguay[97] announced that they could not support the article for reasons of conflict with their respective Constitutions. The Republic of Korea indicated that it had abstained from voting on the provision as that might place its Government in a difficult position because of constitutional considerations.[98] El Salvador indicated that although article 22 raised certain problems for its delegation, it had voted in favour of the article in recognition of the importance of the international practice involved.[99] Following the adoption of the entire Convention on the Law of Treaties, the delegation of Guatemala placed on record its reservations regarding, inter alia, article 25, in the light of limitations imposed by its Constitution.[100]

## B. Shift from provisional "entry into force" to provisional "application"

44. The various iterations of the provision developed by the Commission were framed in terms of "entry into force" on a provisional basis. Nonetheless, references to the phrase "provisional application" can be found in the Commission's records as far back as 1962. For example, that year, Alfred Verdross referred to a practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[101] Herbert Briggs cited the example of a treaty between the United States and the Philippines of which a provision had been given application by presidential proclamation on a date earlier than that of entry into force.[102] Mr. Bartoš, referring to several agreements between Italy and Yugoslavia, indicated that those agreements had provided for provisional application pending ratification.[103]

45. Mr. Waldock's proposal for article 21, in paragraph 2, subparagraph (b), stated that any of the parties might give notice of the termination of the provisional application of the treaty.[104] He explained that there must come a time when States were entitled to say that the provisional application of the treaty must come to an end,[105] and suggested that it was desirable to make withdrawal from the provisional application of the treaty an orderly process.[106] Mr. Tunkin doubted the advisability of including subparagraph (b) because it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself.[107]

46. Article 21 (renumbered 24), adopted by the Commission in 1962, included the following clause: "or the States concerned shall have agreed to terminate the

[94] Ibid., para. 54.
[95] Ibid., para. 67.
[96] Ibid., para. 72.
[97] Ibid., para. 77.
[98] Ibid., para. 102.
[99] Ibid., paras. 103 and 104.
[100] Ibid., 36th plenary meeting, para. 69.
[101] A/CN.4/SR.644, para. 69.
[102] Ibid., para. 87.
[103] A/CN.4/SR.647, para. 98.
[104] See A/CN.4/144 and Add.1.
[105] Ibid., para. (4) of the commentary to article 21.
[106] Ibid.
[107] A/CN.4/SR.657, para. 15.

provisional application of the treaty".[108] The commentary to the article indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved or when the States concerned agreed to put an end to the provisional application of the treaty.[109]

47. Some of the written comments submitted by Governments were formulated in terms of provisional "application". For example, Sweden referred to the termination of provisional application of the treaty.[110] The Netherlands considered the difference between provisional entry into force and provisional application, and suggested that the term "provisional application" might also be understood to refer to a non-binding form of provisional application.[111]

48. It was in the context of a comment by Mr. Reuter, in 1965, that the propriety of referring to "provisional application", as opposed to "provisional entry into force", was raised directly. In his view:

> The expression "provisional entry into force" no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty. Entry into force might depend on certain conditions, a specified term or procedure, which dissociated it from the application of the rules of the treaty. The practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty.[112]

49. Support for this view was expressed by Mr. Verdross, who stated that what was involved was obviously the application of some of the provisions of the treaty, not the treaty as a whole, and certainly not the final clauses;[113] the Chair (Mr. Bartoš);[114] Mr. de Luna, who agreed about the inappropriateness of the expression "provisional entry into force";[115] Manfred Lachs, who expressed the view that the provision really related to the application of the clauses of the treaty on a provisional basis;[116] and Mr. Briggs.[117] Eduardo Jiménez de Aréchaga agreed from a logical point of view, but indicated that the practice of provisional entry into force was a common one.[118]

50. Roberto Ago explained his understanding of the situation, saying that

> article 24 dealt with two entirely different situations. The first, to which Mr. Reuter had referred ... was that where the treaty itself did not enter into force until the exchange of the instruments of ratification or approval; it was by a kind of secondary agreement, separate from the treaty, that the parties, at

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[108] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

[109] Ibid., para. (2) of the commentary to article 24.

[110] A/CN.4/182 and Corr.1 and 2 and Add.1, comment on article 24; see also the comment by Luxembourg on article 12.

[111] See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

[112] A/CN.4/SR.790, para. 75.

[113] Ibid., para. 81.

[114] Ibid., para. 83.

[115] Ibid., para. 91.

[116] Ibid., para. 100.

[117] A/CN.4/SR.791, para. 3.

[118] A/CN.4/SR.790, para. 76. Mr. Tunkin disagreed with Mr. Reuter's view (see A/CN.4/SR.791, para. 29).

> the time of signing, agreed to apply provisionally certain or even all of the treaty's clauses. The second, and more important, situation was that which the Commission had envisaged in 1962 and which the Special Rapporteur had had in mind when proposing his redraft, the case where the treaty actually entered into force at the time of signature but was subject to subsequent ratification; the ratification did no more than confirm what had existed ever since the time of signature. It might be said that in such a case the treaty entered into force subject to a resolutory condition. If the ratification did not take place within the prescribed time, the treaty would cease to be in force; but it would have been in force and produced its effects from the time of signature up to the time when it ceased to be in force through the absence of ratification.... If ... the entry into force did not take place until the time of ratification, what happened during the interim between signature and ratification was that certain of the treaty's clauses were applied provisionally by virtue of a secondary agreement between the parties, and it was only that agreement which entered into force.[119]

He added later that the first of the situations of which he had spoken, that of the provisional application referred to by Mr. Reuter, should be mentioned in article 24.[120]

51. Senjin Tsuruoka indicated his agreement with Mr. Ago that what happened was that an agreement distinct from the treaty entered into force in conformity with article 23; the treaty was then applied provisionally according to the conditions provided for in that subsidiary agreement.[121] Mr. Jiménez de Aréchaga, however, was not convinced that there was any practical difference between the two situations that Mr. Ago had mentioned.[122] Mr. Tunkin agreed with Mr. Ago that two possibilities existed, but, on practical grounds, he did not consider that both should be covered in article 24. Provisional entry into force was of importance, and article 24 should be retained to deal with it.[123]

52. Mr. Waldock later recalled that some difference of opinion had arisen as to whether, in the case contemplated by the article, the treaty entered into force provisionally or there was an agreement to apply certain provisions of the treaty. The Drafting Committee had framed article 24 in terms of the entry into force provisionally of the treaty because that was the language very often used in treaties and by States. Moreover, it seemed to him that the difference between the two concepts was a doctrinal question.[124] He added that article 23 (Entry into force of treaties) in fact contemplated cases where a treaty did not provide for its entry into force but where, by separate agreement, the States concerned agreed that it should be brought into force by a certain date. He could not see that there was any great difference between such a case and cases where the States concerned agreed that, although it was subject to ratification, the treaty was to come into force provisionally.[125]

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[119] A/CN.4/SR.791, paras. 5-7.
[120] Ibid., para. 17.
[121] Ibid., para. 11.
[122] Ibid., para. 53.
[123] Ibid., para. 54.
[124] A/CN.4/SR.814, para. 39.
[125] Ibid., para. 40.

53. At the Vienna Conference, in 1968, the Committee of the Whole considered a joint proposal submitted by Czechoslovakia and Yugoslavia to amend paragraph 1 of article 22 so as to replace the reference to provisional entry into force by provisional application.[126] Support for the amendment was expressed by the United States (if article 22 was to be retained, the words "be applied" should be substituted for "enter into force"),[127] Ceylon (endorsed the use of the term "be applied"),[128] Italy (confusion should be avoided between mere application, which was a question of practice, and entry into force, which was a formal legal notion),[129] Czechoslovakia (the term used should be "provisional application", because there could hardly be two entries into force),[130] Israel (the word "provisionally" introduced a time element, and unless emphasis was placed on application rather than entry into force, it would be necessary to specify that the word "provisionally" referred to time and not to legal effects),[131] France (the notion of provisional entry into force was difficult to define legally),[132] Switzerland,[133] the United Kingdom (it was the application rather than the entry into force of the treaty that was contemplated),[134] Greece,[135] Cambodia,[136] Thailand[137] and Ecuador (the reference to "provisional application" had a more legal connotation and was more accurate than "entry into force provisionally").[138] Iraq, however, disagreed (from the legal point of view, the situation was the same as when the treaty entered into force. The only difference was in the time factor).[139]

54. The Expert Consultant recalled that the International Law Commission, and especially its Drafting Committee, had discussed at length the choice between the expressions "provisional application" and "entry into force provisionally". The Commission had finally decided to refer to "entry into force provisionally" because it understood that the great majority of treaties dealing with the institution under discussion expressly used that term. From the point of view of juridical elegance, it also seemed preferable not to speak of application, since it was clear that before any treaty provisions could be applied, some international instrument must have come into force. That instrument might be the main treaty itself, or an accessory agreement such as an exchange of notes outside the treaty. Another reason was that it was very common for that institution to be used in cases where there was considerable urgency to put the provisions of the treaty into force. In those cases, ratification sometimes never took place, because the purpose of the treaty was actually

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[126] A/CONF.39/C.1/L.185 and Add.1, reproduced in *Official Records of the United Nations Conference on the Law of Treaties*; vol. III, Report of the Committee of the Whole, para. 224.
[127] Ibid., vol. I, 26th meeting of the Committee of the Whole, para. 24.
[128] Ibid., paras. 34 and 35.
[129] Ibid., para. 43.
[130] Ibid., para. 37.
[131] Ibid., para. 44.
[132] Ibid., para. 45.
[133] Ibid., para. 46.
[134] Ibid., para. 49.
[135] Ibid., para. 54.
[136] Ibid., 27th meeting of the Committee of the Whole, para. 4.
[137] Ibid., para. 8.
[138] Ibid., para. 14.
[139] Ibid., 26th meeting of the Committee of the Whole, para. 52.

completed before it could take place. Clearly such acts must have a legal basis, and for that reason reference should be made to "entry into force provisionally".[140]

55. Nonetheless, the amendment was adopted, and subsequent versions of the article reflected the new formulation. The matter arose again the following year when an exchange of views was held in the plenary of the Conference regarding the legal implications of the change in formulation.[141]

## C. Legal basis for provisional application

56. The International Law Commission initially conceived of the practice of provisional entry into force as a possibility afforded only under the terms of the treaty itself. Mr. Lauterpacht, in 1953, provided examples of specific provisions in treaties permitting application prior to entry into force.[142] Mr. Fitzmaurice, in his first report, retained this approach in his proposal for article 42, paragraph 1 ("a treaty may, however, provide that it shall come into force provisionally").[143] Likewise, Mr. Waldock, in his first report, initially also limited it to treaties which expressly provided therefor.[144] The debate in the Commission in 1962 was also framed in such terms. For example, Mr. Bartoš cited examples of international agreements in which it had been stipulated that the treaty should be applied from the day of signature, whereas the treaty's binding force was conditional on the exchange of the instruments of ratification.[145]

57. However, Mr. Rosenne noted that sometimes, where a formal agreement was made subject to ratification, an agreement in simplified form was concluded for the interim period to bring the former provisionally into force until it had been ratified or until it had become clear that it was not going to be ratified.[146] The Special Rapporteur agreed, stating that an explanation was necessary in the commentary to indicate that that eventuality was covered, since the language of article 21 did not specifically cover the point.[147] While article 21 (renumbered 24), adopted by the Commission that year, retained the earlier approach, the commentary included the observation that whether the treaty was to be considered as entering into force provisionally in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text might be a question.[148]

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[140] Ibid., 27th meeting of the Committee of the Whole, paras. 15-18.

[141] See the discussion in paras. 77-79 of the present memorandum.

[142] A/CN.4/63, para. 5 (b) of the comment on article 6 (2) (b).

[143] See A/CN.4/101.

[144] A/CN.4/144 and Add.1, articles 20 (6) ("a treaty may prescribe that it shall come into force provisionally") and 21 (2) (a) ("when a treaty lays down that it shall come into full force provisionally").

[145] A/CN.4/SR.647, para. 97. See also the statement of Yuen-li Liang, Secretary of the Commission, referring to a passage in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7, para. 42), which provided that a State could not become a party to an agreement on a provisional basis, or with respect to certain of its provisions only, unless such a possibility was provided for in the agreement (ibid., para. 40).

[146] A/CN.4/SR.668, para. 38.

[147] Ibid., para. 39.

[148] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

58. In his fourth report, Mr. Waldock, in response to a comment submitted by Sweden in which the possibility of separate agreement between the parties was raised,[149] proposed to revise article 24 in order to take account of cases where the agreement to bring the treaty into force provisionally was not expressed in the treaty itself but concluded outside it.[150] His proposed text read, in fine: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force it shall come into force provisionally".[151] The Special Rapporteur explained that the word "otherwise" was intended to cover the case in which there was no provision on the subject in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes. That agreement would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question.[152]

59. Different views were expressed on the point in the Commission. For example, while Mr. Rosenne proposed referring only to the agreement of the parties,[153] Mr. Lachs preferred referring to both situations.[154] Mr. El-Erian was of the view that the question of whether provisional entry into force had its source in the treaty itself or in a subsidiary agreement was a doctrinal issue which could be left to interpretation.[155] The Special Rapporteur observed that if no provision was made in the treaty itself, States could not be prevented from bringing the whole or part of the treaty into force by separate agreement.[156]

60. The text eventually adopted by the Commission referred to the provisional entry into force of a treaty in two scenarios: where the treaty itself prescribed, or where the negotiating States had in some other manner so agreed.[157] As regards the latter, the commentary indicated that an alternative procedure having the same effect was for the States concerned, without inserting a clause in the treaty, to enter into an agreement in a separate protocol or exchange of letters, or in some other manner, to bring the treaty into force provisionally.[158]

61. At the Vienna Conference, all the proposals for amendments to paragraph 1 of article 22 retained the two possibilities for bringing about the provisional application of a treaty indicated in the version adopted by the Commission.

## D. Provisional application of part of a treaty

62. The early proposals for a provision on provisional entry into force, up until and including that made by Mr. Waldock in his first report, were focused on the entire treaty. Nonetheless, in 1962 the Commission adopted, on first reading, a revised version of the article which referred to the provisional entry into force of a treaty either in whole or in part.[159] In 1965, the article was restructured by the

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149 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.
150 See A/CN.4/177 and Add.1-2.
151 Ibid.
152 A/CN.4/SR.790, para. 90.
153 Ibid., para. 95.
154 Ibid., para. 101.
155 Ibid., para. 97.
156 A/CN.4/SR.814, para. 46.
157 *Yearbook of the International Law Commission, 1966*, vol. II, p. 210, article 22, para. 1.
158 Ibid., para. (2) of the commentary to article 22.
159 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, article 24.

Drafting Committee by, inter alia, moving the question of provisional entry into force of part of a treaty into a second paragraph, which read, in the form subsequently adopted: "The same rule applies to the entry into force provisionally of part of a treaty". The commentary included the following explanation:

> No less frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation or to prepare the way for the entry into force of the whole treaty a little later.[160]

63. While two proposals to delete paragraph 2[161] were rejected[162] at the Vienna Conference, a joint proposal by Czechoslovakia and Yugoslavia for paragraph 1[163] was approved,[164] resulting in the content of paragraph 2 of the Commission's version being moved into the chapeau to paragraph 1 ("A treaty or a part of a treaty is applied provisionally").

## E. Conditionality

64. During the early consideration in the Commission, references to the provisional entry into force of a treaty typically also alluded to the conditions under which the treaty would enter into force on a provisional basis. Mr. Lauterpacht, in his first report, cited examples of treaties coming into force, prior to ratification, upon a certain date, i.e., the date of signature, or within 15 days therefrom.[165] In his proposal for article 42, paragraph 1, Mr. Fitzmaurice envisaged the provisional entry into force of a treaty taking place on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications.[166] Similarly, Mr. Waldock included a reference to provisional entry into force taking place "on signature or on a specified date or event", in his proposal for article 20, paragraph 6, as well as "upon a certain date or event", in that for article 21, paragraph 2, subparagraph (a).[167] Article 21 (renumbered 24), adopted in 1962, spoke of provisional entry into force "on a given date or on the fulfilment of specified requirements".[168]

65. However, the text adopted by the Commission in 1965 excluded any reference to a date or event upon which a treaty would enter into force on a provisional basis.

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160 *Yearbook of the International Law Commission, 1966*, vol. II, p. 210, para. (3) of the commentary to article 22.

161 Proposals by the Philippines (see A/CONF.39/C.1/L.165) and jointly by Czechoslovakia and Yugoslavia (see A/CONF.39/C.1/L.185 and Add.1). See also the statements of the Philippines (*Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 25) and of Malaysia and Thailand (ibid., 27th meeting of the Committee of the Whole, paras. 7 and 8).

162 By 63 votes to 11, with 12 abstentions (ibid., vol. III, Report of the Committee of the Whole, para. 227 (a)).

163 See A/CONF.39/C.1/L.185 and Add.1.

164 By 72 votes to 3, with 11 abstentions (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 227 (b).

165 A/CN.4/63, para. 5 (b) of the comment on article 6 (2) (b).

166 See A/CN.4/101.

167 See A/CN.4/144 and Add.1.

168 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

This was maintained in all subsequent versions, including that eventually adopted as article 25 of the Convention.

## F. Juridical nature of provisional application

### 1. Consideration in the context of the provisional application of treaties

66. The general position of the Commission, maintained throughout its consideration of the provisional entry into force of treaties, was that such practice resulted in an obligation to execute the treaty, even if only on a provisional basis.[169]

67. For example, Mr. Fitzmaurice, in his first report, proposed article 42, which, in its paragraph 1, provided that in such cases, an obligation to execute the treaty on a provisional basis would arise.[170] During the debate on the report, in 1959, in response to a query by Mr. Bartoš (who wondered what the juridical status of such agreements would be if one of the parties failed to ratify), the Special Rapporteur recalled that the point was covered in article 42, paragraph 1.[171] Mr. Scelle, however, considered that a treaty which had not been ratified could not be regarded as having been concluded or as having effect.[172]

68. The matter was raised again in 1962, during the consideration of Mr. Waldock's first report, and not only in the context of his proposals on the provisional entry into force of treaties. In the context of draft article 9 (Legal effects of a full signature), specifically as regarding the reference to good faith on the part of a signatory State, in paragraph 2, subparagraph (c), Mr. Verdross indicated that if a treaty was signed subject to ratification and not ratified, no obligation would arise. That would not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification; it would then be ratified de facto.[173] The matter was again taken up by Mr. Bartoš, at a later meeting, during the discussion on article 12 (Legal effects of ratification), where he stated that from time to time it happened that the exchange of the instruments of ratification did not take place until some time after the provisions of the treaty, although up to that point only of provisional validity, had been applied in full. Subsequent ratification in such a case gave binding force to the effects of the treaty and to acts based on the treaty.[174]

69. The view of the two Special Rapporteurs who dealt with the question of the provisional entry into force of treaties in their respective reports, Mr. Fitzmaurice and Mr. Waldock, was clear: both chose to deal with the arrangement as a species of the entry into force of treaties, with all the legal consequences that followed. Mr. Waldock was the more explicit on the point.[175] In explaining his proposal for article 20, paragraph 6, he indicated that a clause providing for the provisional entry

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[169] See the statement by Mr. François, in 1951, which, although pertaining more directly to the question of the impact of internal law on the observance of treaties, illustrated the type of legal complexity that could arise in the context of treaties being provisionally applied (A/CN.4/SR.88, paras. 37-38).

[170] See A/CN.4/101.

[171] A/CN.4/SR.487, paras. 37-38.

[172] Ibid., para. 39.

[173] A/CN.4/SR.644, para. 69.

[174] A/CN.4/SR.647, para. 97.

[175] For Mr. Fitzmaurice's view, see para. 67 of the present memorandum.

into force of the treaty was, from one aspect, a clause relating to a mode of bringing a treaty into force.[176] The "legal effects" of provisional entry into force were then outlined in his proposal for article 21, in paragraph 2, subparagraph (a), which provided that the rights and obligations contained in the treaty shall come into operation for the parties to it.[177] He indicated that paragraph 2 sought to formulate the legal effects of the provisional entry into force of a treaty. Clearly, the rule in 2 (a) followed simply from the provisional nature of the entry into force.[178]

70. Notwithstanding the contrary view of at least one member,[179] the Commission retained such contextual reference to "entry into force" in article 22 (renumbered 24), as adopted in 1962.[180] Following on the suggestion by Mr. Bartoš that some explanation was needed in the commentary to forestall the argument that there was something illogical in a treaty being brought into force provisionally and made subject to the exchange of instruments of ratification in order to have binding force,[181] the commentary to article 24 confirmed that there could be no doubt that such clauses had legal effect and brought the treaty into force on a provisional basis.[182]

71. In its written comments on the provision, submitted in 1965, the Netherlands indicated that it interpreted this article as referring only to cases in which States had legally committed themselves to a provisional entry into force. It added, however, that the signatory States might also enter into a non-binding agreement concerning provisional entry into force (within the limits imposed by their respective national laws).[183]

72. In 1965, the Chair (Mr. Bartoš), commenting on article 24, expressed the view that international relations would be made easier if States were given the possibility of putting certain treaties into force provisionally, before ratification, not as a mere practical expedient, but with all the legal consequences of entry into force. He was convinced that the provisional entry into force really conferred validity and a legal obligation; even if the treaty subsequently lapsed owing to lack of ratification, that dissolution of the treaty would not be retroactive and did not prevent the treaty from having been in force during a certain time. There had been a legal position which had produced its effects, and situations had been created under that regime; consequently, the question could not be said to be purely abstract.[184]

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176 A/CN.4/144 and Add.1, para. (7) of the commentary to article 20.

177 Ibid., article 21 (2) (b).

178 Ibid., para. (4) of the commentary to article 21.

179 A/CN.4/SR.657, para. 9 (Mr. Castrén).

180 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182 ("the treaty shall come into force as prescribed and shall continue in force"). See also the view of the Sixth Committee, adopted the following year, in the context of the regulations for the implementation of Article 102 of the Charter of the United Nations ("It was recognized that, for the purposes of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto") (A/CN.4/154, in *Yearbook of the International Law Commission, 1963*, vol. II, p. 29).

181 A/CN.4/SR.668, para. 40.

182 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

183 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

184 A/CN.4/SR.791, para. 24. See also the statement of Mr. Tsuruoka (ibid., para. 27).

73. At the Vienna Conference, the question of the legal nature of the provisional application of a treaty was discussed primarily in the context of the principle of *pacta sunt servanda*.

### 2. Consideration in the context of the *pacta sunt servanda* principle

74. The juridical nature of the provisional application of treaties was also raised in the context of the Commission's consideration of the principle of *pacta sunt servanda*. The commentary to article 55, adopted in 1964, indicated that it was necessary on logical grounds to include the words "in force". Since the Commission had adopted a number of articles which dealt with the entry into force of treaties, including cases of provisional entry into force, it seemed necessary to specify that it was treaties in force in accordance with the provisions of the present articles to which the *pacta sunt servanda* rule applied.[185]

75. Israel, in its written comments, submitted in 1965, referred to the commentary to article 55, and observed that the question might arise as to the interrelation of this article with article 24 (on provisional entry into force), it being understood, that the general principle of *pacta sunt servanda* would apply to the underlying agreement upon which the provisional entry into force was postulated.[186]

76. In response to the latter observation, Mr. Waldock, in his sixth report, recalled that the Commission had not, either in 1962 or in 1965, sought to specify what precisely was the source of the parties' obligations in cases of provisional entry into force.[187] He continued:

> Article 24, as it now reads, states the law unambiguously in terms of the treaty's entering into force provisionally; in other words, under article 24 the treaty is stated as being brought "into force". Consequently, there does not appear to be any need in the present article to make special reference to "treaties provisionally in force". Under the present article, the *pacta sunt servanda* rule is expressed to apply to every "treaty in force" ... treaties may be in force under article 24 as well as under article 23....[188]

The commentary to article 23 (formerly article 55), adopted in 1966, confirmed that the words "in force" covered treaties in force provisionally under article 22.[189]

77. At the Vienna Conference, during the discussion on article 23 in 1968, an exchange of views was held as to whether the shift from "provisional entry into force" to "provisional application", in article 22, had modified the juridical nature of that provision. On the one hand, the United Kingdom indicated its understanding that the rule in article 23 continued to apply equally to a treaty which was being applied provisionally under article 22, notwithstanding the minor drafting changes.[190] India disagreed, taking the view that any obligations that might arise

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185 *Yearbook of the International Law Commission, 1964*, vol. II, p. 177, para. (3) of the commentary to article 55.

186 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

187 See A/CN.4/186 and Add.1-7.

188 Ibid.

189 *Yearbook of the International Law Commission, 1966*, vol. II, p. 211, para. (3) of the commentary to article 23.

190 *Official Records of the United Nations Conference on the Law of Treaties*, vol. II, 11th plenary meeting, para. 58.

under article 22 would come under the heading of the general obligation of good faith on the basis of article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) rather than of article 23 (*Pacta sunt servanda*).[191]

78. Norway advised caution so as to avoid the conclusion that the rule in article 23 did not apply to a treaty which was being provisionally applied.[192] In its view, it was clear that under customary international law the *pacta sunt servanda* principle also applied to a treaty during a period of provisional application.[193] Colombia agreed, proposing that the words "or being applied provisionally" be inserted after the words "in force", in article 23.[194] Yugoslavia also proposed a similar amendment to article 23 with a view to ensuring that the wording of the article should cover treaties applied provisionally, the subject of article 22.[195] Romania expressed the view that it was obvious that the principle of *pacta sunt servanda* was just as applicable to treaties which were in force provisionally.[196]

79. The President of the Conference, Mr. Ago, subsequently noted that no one had doubted the soundness of the Yugoslav and Colombian amendments. He then stated that it was obvious that the expression "treaty in force" also covered treaties applied provisionally.[197] The Yugoslav amendment was referred to the Drafting Committee and was considered together with a further Yugoslav proposal, for the inclusion of an article 23 bis, which would have read as follows: "Every treaty applied provisionally in whole or in part is binding on the contracting States and must be performed in good faith".[198] The Chair of the Drafting Committee later indicated that it had considered the Yugoslav proposal to be self-evident and that provisional application also fell within the scope of article 23 on the *pacta sunt servanda* rule.[199]

### 3. Consideration in the context of the obligation not to frustrate the object of the treaty or to impair its eventual performance

80. Treaties being applied on a provisional basis were also referred to in the course of the discussion on the good faith obligation to refrain from the frustration of the object of the treaty or to impair its eventual performance. In his first report, issued in 1962, Mr. Waldock proposed article 9, entitled "Legal effects of a full signature", which, in its paragraph 2, subparagraph (c), provided: "The signatory State, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance".[200]

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[191] Ibid., para. 70.

[192] Ibid., vol. II, 12th plenary meeting, para. 32. See also ibid., vol. I, 29th meeting of the Committee of the Whole, para. 58.

[193] Ibid., vol. II, 12th plenary meeting, paras. 33 and 34.

[194] Ibid., para. 45.

[195] Ibid., para. 50. See also the views of Nepal (ibid., para. 56) and the Ukrainian Soviet Socialist Republic (ibid., para. 61).

[196] Ibid., para. 58.

[197] Ibid., para. 63.

[198] See A/CONF.39/L.24.

[199] *Official Records of the United Nations Conference on the Law of Treaties*, vol. II, 28th plenary meeting, para. 47. See also the statement by Poland (ibid., 29th plenary meeting, paras. 2 and 3).

[200] See A/CN.4/144 and Add.1.

81. During the debate on article 9 that year, Mr. Bartoš welcomed the "good faith" clause in subparagraph 2 (c), in view of the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification.[201] Mr. Briggs noted that certain provisions of certain treaties might enter into force on signature.[202] He proposed to include a provision to the effect that, pending the entry into force of a treaty, the obligation not to frustrate the objects of the treaty would be not merely one of good faith, but one which derived from a rule of general international law.[203] Furthermore, Mr. Verdross took the view that paragraph 2, subparagraph (e) ("The signatory State shall also be entitled to exercise any other rights specifically conferred by the treaty itself or by the present articles upon a signatory State") did not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[204]

82. In response to the debate, the Special Rapporteur, after proposing to move subparagraph (d) into a separate article on the rights and obligations of States pending the entry into force of a treaty in the preparation of which they had participated,[205] added that during the discussion, some members had suggested that the provisions of subparagraph (e) could be useful to cover the question of provisional entry into force. He agreed that that was so.[206] The Drafting Committee later proposed a new article (subsequently renumbered as article 17) which was restricted to the general good faith obligation to refrain from acts calculated to frustrate the objects of the treaty.

83. In 1965, Mr. Briggs noted that article 24 (Provisional entry into force) was different from article 17, which set out certain obligations that good faith imposed, pending the entry into force of the treaty, on States which had participated in the preparation of its text. In the case envisaged in article 24, on the other hand, the participants had prescribed that certain parts of the treaty would apply pending the exchange of ratifications.[207]

84. Article 17 was later adopted as article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force). The provisional application of treaties was not raised during the consideration of article 15 at the Vienna Conference.

## G. Termination of provisional application

85. The question of the termination of provisional entry into force featured in the earlier proposals in the International Law Commission. However, it was, for the most part, excluded from article 22 of the 1966 draft articles on the law of

201 A/CN.4/SR.643, para. 86.
202 A/CN.4/SR.644, para. 87.
203 Ibid., para. 88.
204 Ibid., para. 69.
205 A/CN.4/SR.645, para. 17.
206 Ibid., para. 18.
207 A/CN.4/SR.791, para. 2.

treaties,[208] only to be reinserted, into what became article 25, at the Vienna Conference, at the behest of Governments.

86. It is worth recalling that paragraph 2 of article 25 indicates only one method of the termination of provisional application, i.e., through notification by the State wishing to terminate. Other processes or grounds may be expressly provided for by the treaty itself or by separate agreement between the negotiating States. The negotiating history of the provision reveals that other possibilities for the termination of provisional application were considered.

### 1. Termination upon entry into force of the treaty being provisionally applied

87. Article 20 paragraph 6, as proposed by Mr. Waldock in his first report, provided that a treaty may enter into force provisionally pending its full entry into force.[209] Likewise, subparagraph (a) of article 21, paragraph (2), referred to the provisional entry into force of a treaty until the treaty enters into full force in accordance with its terms.[210] This assertion was presented as a matter of logic, arising from the provisional nature of the entry into force.[211]

88. The Special Rapporteur's proposal was reflected in the text of article 22 (renumbered 24), adopted in 1962, which, in its second sentence provided for, inter alia, the continuation in force of a treaty on a provisional basis "until ... the treaty shall have entered into force definitively".[212] The commentary to article 24 indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty.[213]

89. This understanding was retained in all subsequent versions of the provision, as adopted by the Commission. It even survived the decision, taken in 1965, to delete the clause on the termination of the provisional entry into force of a treaty.[214] The article eventually adopted by the Commission retained the idea, in paragraph 1 (a), that provisional entry into force was to be undertaken pending ratification, acceptance, approval or accession by the contracting States.[215]

90. At the Vienna Conference, a proposal was made by Hungary and Poland to, inter alia, include a more direct reference to provisional application being terminated when the treaty entered into force, in a new paragraph on termination

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[208] Up until 1965, the various versions of the draft article, including that adopted in 1962, made specific reference to the termination of provisional entry into force. In 1965, at the suggestion of the Special Rapporteur, who had come to the conclusion that it was somewhat inconsistent that article 24 should be the only article in part I which dealt with termination, the Drafting Committee decided that article 24 should deal only with the case of a treaty's entry into force provisionally (see A/CN.4/SR.814, para. 44). See also A/CN.4/SR.791, para. 57, and the views of Mr. Ago (A/CN.4/SR.814, para. 49). This position was reiterated in para. (4) of the commentary to article 22 of the articles on the law of treaties, of 1966 (see *Yearbook of the International Law Commission, 1966*, vol. II, p. 210).

[209] A/CN.4/144 and Add.1.

[210] Ibid.

[211] Ibid., para. (4) of the commentary to article 21.

[212] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

[213] Ibid., para. (2) of the commentary to article 24.

[214] See note 208.

[215] *Yearbook of the International Law Commission, 1965*, vol. II, p. 162.

(together with the other grounds for termination).[216] The text which subsequently emerged from the Drafting Committee (and which was later adopted as article 25 of the Convention), however, maintained the Commission's approach of referring to the termination of provisional application upon the entry into force of the treaty in paragraph 1, as opposed to paragraph 2, on the termination of provisional application. During the debate on article 22, held in the plenary of the Conference, in 1969, the Expert Consultant observed that it was implied in the notion of provisional application that such application was provisional pending definitive entry into force.[217]

### 2. Unilateral termination versus termination by agreement

91. Mr. Waldock's proposal for subparagraph (b) of article 21 (2), submitted in 1962, included the possibility of unilateral termination through the giving of notice ("any of the parties may give notice of the termination of the provisional application of the treaty"), the legal effect of which was tied to the elapse of a period of six months (from the giving of the notice).[218] Upon the conclusion of the notice period, the rights and obligations contained in the treaty would cease to apply with respect to that party.[219] In his commentary to the article, he characterized such unilateral termination as a form of withdrawal, and indicated that it seemed desirable to try to give a little more definition to the rule, and perhaps to make withdrawal from the provisional application of the treaty an orderly process.[220] He also hinted at the possibility that this mode of the termination of provisional entry into force might not affect the position of other States for which the treaty had entered into force provisionally, by stating that the draft also suggested that withdrawal would affect only the particular party concerned.[221] However, the text adopted by the Commission in 1962[222] did not include reference to a notice requirement. Instead, the element of initiative, on the part of one or all States, was restricted entirely to mutual agreement.

92. The possibility of termination through notice in subparagraph (b) of article 21 (2) was subject to the general proviso "unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis".[223] Although subparagraph (b) was not referred to the Drafting Committee (for other reasons), the notion of the termination of provisional entry into force by agreement between the parties survived in the text for article 22 (renumbered 24), adopted by the Commission in 1962.[224] In that version, agreement of the parties was presented as one of two modes of termination (the other being automatic termination upon the entry into force of the treaty): "the treaty … shall continue in force on a provisional

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[216] A/CONF.39/C.1/L.198, reproduced in *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 224.

[217] Ibid., vol. II, 11th plenary meeting, para. 63.

[218] A/CN.4/144 and Add.1, article 21 (2) (b).

[219] Ibid.

[220] Ibid., para. (4) of the commentary to article 21.

[221] Ibid. He, however, qualified the suggestion by stating that this might be a matter for further examination.

[222] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

[223] A/CN.4/144 and Add.1, article 21 (2) (b).

[224] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

basis until … the States concerned shall have agreed to terminate the provisional application of the treaty".[225]

93. This was criticized by the Netherlands, in a written comment in which it maintained that a Government should also be entitled to terminate a provisional entry into force unilaterally if it had decided not to ratify a treaty that had been rejected by Parliament or if it had decided for other similar reasons not to ratify it.[226]

94. In 1965, José Maria Ruda stated his view that from the point of view of legal theory, so long as definitive consent had not been given, each of the parties should remain free to withdraw from the treaty and, consequently, to terminate its provisional application.[227] Mr. Lachs went further, suggesting that the right of initiative arose in cases in which the ratification of a treaty had been delayed.[228] Mr. Tsuruoka expressed support for the position that the provisional entry into force of the treaty would be presumed to terminate when one of the parties had given notice that it would not ratify the treaty.[229] However, the matter was overtaken by the decision of the Commission to no longer include a specific provision on the termination of provisional entry into force.[230]

95. Belgium, in its written comments submitted in 1967, referred back to the text adopted by the Commission in 1962 and objected to the linking of the termination of provisional entry into force to mutual agreement. It maintained that this stance meant that it would have been impossible for a State to relinquish the obligation to apply the treaty provisionally unless the other contracting States agreed, adding that it would be advisable to provide a means by which the provisional application of a treaty not yet ratified could be terminated unilaterally.[231] During the debate on the law of treaties held in the Sixth Committee at the twenty-second session of the General Assembly, in 1967, Sweden agreed with the Belgian comment, expressing the view that there might be a need to allow States the freedom to terminate such treaties unilaterally without prior notice.[232]

96. At the first session of the Vienna Conference, in 1968, two proposals were made to include of a new paragraph reintroducing the question of the termination of provisional application. Under the proposal submitted by Belgium, a State wishing to terminate the provisional entry into force of a treaty could do so by manifesting its intention not to become a party to the treaty, subject to the proviso "unless otherwise provided or agreed".[233] Hungary and Poland submitted a joint proposal for a new paragraph which recognized notification by one of such States of its

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225 Ibid.

226 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

227 A/CN.4/SR.790, para. 87.

228 Ibid., para. 103.

229 A/CN.4/SR.791, para. 12. Support for a notification requirement was also indicated by Mr. Tunkin (ibid., para. 30), Mr. Rosenne (ibid., para. 32), Mr. Jiménez de Aréchaga (ibid., para. 51) and Mr. Ago (A/CN.4/SR.814, para. 49).

230 See note 208.

231 A/6827, p. 6.

232 *Official Records of the General Assembly, Twenty-second Session*, Sixth Committee (Legal Questions), 980th meeting, para. 13.

233 A/CONF.39/C.1/L.194, reproduced in *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 224.

intention not to become a party to the treaty with respect to that State as among the possible grounds for the termination of provisional application.[234]

97. During the debate in 1968, the United States supported the idea of permitting the termination of provisional application either by mutual agreement or upon unilateral notification, and made a proposal of its own.[235] Belgium, referring to its proposed amendment, explained that there was no question of applying the provisions of the draft relating to denunciation of treaties, because a State could not denounce a treaty to which it was not yet party.[236] Italy,[237] France,[238] Switzerland,[239] the United Kingdom[240] and Australia[241] approved of the Belgian amendment.

98. The Committee of the Whole later decided to reinsert a paragraph on termination, based on the Belgian and Polish-Hungarian amendments. The text for article 22, subsequently proposed by the Drafting Committee, contained a new paragraph 2 which established the primary mode of termination of provisional application as being on the basis of unilateral notification, subject to a general proviso as to mutual agreement, reflected in either the treaty or in a subsequent agreement.[242]

99. The new paragraph on the termination of provisional application was scrutinized during the debate on article 22, held in the plenary of the Conference, in 1969. Iran maintained that it allowed the possibility of withdrawal by a State which had already signed a treaty and would seem to undermine the *pacta sunt servanda* rule.[243] In response to a comment by the President of the Conference, pointing to the difficulties in understanding the phrase "unless the treaty otherwise provides",[244] the Chair of the Drafting Committee recalled the decision of the Committee of the Whole to include a paragraph on termination, and clarified that a State which had accepted the provisional application of a treaty could decide later that it did not wish to become a party; upon the other States concerned being notified of that intention, provisional application would cease.[245]

100. Several delegations, including Iran,[246] remained unconvinced. Greece noted that paragraph 2 could give rise to insecurity because in parliamentary systems it was possible for a Government to change its mind and to express a different intention at a later stage.[247] Italy queried as to the legal effect of the termination of provisional application (whether *ex tunc* or *ex nunc*).[248] Poland made a late proposal, which was not adopted, to establish a six-month period before the termination of provisional

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234 A/CONF.39/C.1/L.198, ibid.

235 *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 24.

236 Ibid., para. 42.

237 Ibid., para. 43.

238 Ibid., para. 45.

239 Ibid., para. 47.

240 Ibid., para. 49.

241 Ibid., 27th meeting of the Committee of the Whole, para. 10.

242 Ibid., vol. III, Report of the Committee of the Whole, para. 230.

243 Ibid., vol. II, 11th plenary meeting, para. 62.

244 Ibid., para. 65.

245 Ibid., para. 66.

246 Ibid., para. 71.

247 Ibid., para. 75.

248 Ibid., para. 84.

application could take effect.[249] The Conference subsequently adopted article 22 (later renumbered 25), including paragraph 2, without further amendment.

### 3. Termination as a consequence of unreasonable delay or reduced probability of ratification

101. Mr. Fitzmaurice's proposal for article 42, made in 1956, included the following reference in paragraph 1: "an obligation to execute the treaty on a provisional basis ... will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable".[250] Unreasonable delay, leading to the perception of the reduced likelihood of ratification, as a ground for termination of provisional entry into force was referred to on several subsequent occasions. For example, Mr. Scelle, during the debate in 1959 on another provision, expressed the view that the days when States could disavow the signatures of their plenipotentiaries had passed; those plenipotentiaries were no longer mere authorized agents. They now had special powers which committed the State to some extent, and the authorities competent to ratify the instrument were no longer free to act arbitrarily. If, acting through simple caprice or with ill intent, they delayed entry into force, a certain State responsibility was entailed. That observation applied to some extent to the special case of treaties that entered into force provisionally.[251]

102. Mr. Waldock, in his proposal for article 21 (2), subparagraph (b), submitted in 1962, cited the circumstance in which the entry into full force of the treaty was unreasonably delayed as the ground for any of the parties to give notice of termination.[252] He explained that he had made the proposal, which was put forward *de lege ferenda*, because it seemed evident that if the necessary ratifications or acceptances, etc., were unreasonably delayed so that the provisional period was unduly prolonged, there had to come a time when States were entitled to say that the provisional application of the treaty had to come to an end.[253]

103. The suggested link to "unreasonable delay" did not, however, find favour with the Commission as a whole. Erik Castrén considered the expression to be far from clear.[254] Mr. Jiménez de Aréchaga doubted the advisability of the rule proposed *de lege ferenda* in paragraph 2 (b); it could have the effect of upsetting certain established treaty relations, and seemed more relevant to the termination of treaties than to the legal effects of entry into force.[255] Mr. Tunkin also expressed doubts, noting that it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself, on the ground that, in that State's own view, there had been unreasonable delay in the entry into full force of the treaty.[256] The Special Rapporteur subsequently indicated his willingness to drop subparagraph (b), and observed that it sometimes occurred that a treaty remained in force provisionally throughout its life,

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[249] Ibid., para. 88.

[250] See A/CN.4/101. In his commentary to the provision, the Special Rapporteur simply noted that it "states the rule applicable in case [provisional entry into force] becomes unduly prolonged" (ibid., para. 106).

[251] A/CN.4/SR.488, para. 2.

[252] A/CN.4/144 and Add.1, article 21 (2) (b).

[253] Ibid., para. (4) of the commentary to article 21.

[254] A/CN.4/SR.657, para. 11.

[255] Ibid., para. 14.

[256] Ibid., para. 15.

the device of provisional entry into force being used merely because there was no expectation of parliamentary approval for ratification within due time. In those cases, the treaty never entered formally into full force, because the objects of the treaty were achieved without the "provisional" character of the entry into force ever being terminated.[257]

104. Following the demise of subparagraph (b), the link between the termination of provisional entry into force and undue delay did not feature in any of the subsequent iterations of the provision up to, and including, article 25 of the Convention on the Law of Treaties.

105. Nonetheless, the element of delay, and resultant reduced probability of ratification, was retained in the commentary to article 24, adopted in 1962, which stated, inter alia: "Clearly, the 'provisional' application of the treaty will terminate … upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed".[258]

106. There was an attempt in 1965 to revive the element of reduced probability of ratification. Sweden, in a written comment, recalled the passage in the commentary to article 24 and expressed the view that it came closest to the legal position underlying the prevailing practice.[259] The Special Rapporteur concurred with the Swedish comment and, in his fourth report, submitted in 1965, proposed to include a new reference to the treaty continuing in force provisionally, inter alia, until "it shall have become clear that one of the parties will not ratify or, as the case may be, approve it".[260]

107. That year, Mr. Jiménez de Aréchaga, while agreeing with the Special Rapporteur's new clause, observed that the formulation was more suited to bilateral treaties; a multilateral treaty would not necessarily lapse for the other parties concerned.[261] Mr. Castrén was of the view that the new language brought the provision closer to unilateral termination, which he thought went too far.[262] Mr. Lachs pointed out that in some cases the position as to ratification or non-ratification by a State would never become clear and that there were many cases in which treaties had remained for years on the agenda of the legislative bodies empowered to ratify them, without any action being taken.[263] He also suggested that the point could be covered by specifying that a State must clarify its position within a certain period of time.[264] Mr. Tunkin, in expressing misgivings about the Special Rapporteur's new formulation, stated that the matter could not be left to a mere inference.[265] The issue was overtaken by the Commission's decision not to include a specific reference to the termination of provisional entry into force.[266]

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257 Ibid., para. 17.

258 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (2) of the commentary to article 24.

259 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

260 See A/CN.4/177 and Add.1-2.

261 A/CN.4/SR.790, para. 77.

262 Ibid., para. 80.

263 Ibid., para. 102. See also the views of Mr. Ago (A/CN.4/SR.791, para. 8).

264 A/CN.4/SR.790, para. 102.

265 A/CN.4/SR.791, para. 30.

266 See note 208.

108. At the Vienna Conference, in 1968, Ceylon observed that attention should also be given to limiting the period of provisional application. After a specified date, provisional application would cease until ratification.[267] In 1969, Austria proposed the inclusion of a new paragraph providing that the provisional application of a treaty did not release a State from its obligation to take a position within an adequate time limit regarding its final acceptance of the treaty.[268] India expressed the view that it would probably be desirable to lay down some time limit for States to express their intention in the matter, so that the provisional application of a treaty might not be perpetuated.[269] However, such proposals were not accepted, and the Conference subsequently adopted the article without reference to the effect of delay.[270]

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[267] *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 32.

[268] Ibid., vol. II, 11th plenary meeting, para. 61.

[269] Ibid., para. 70.

[270] Following the adoption of the article, the Drafting Committee decided not to accept any of the suggestions made during the debate (ibid., 28th plenary meeting, paras. 45-47).

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# Formation and evidence of customary international law

## Elements in the previous work of the International Law Commission that could be particularly relevant to the topic

## Memorandum by the Secretariat

*Summary*

This memorandum was prepared in response to a request made by the International Law Commission at its sixty-fourth session (2012). It endeavours to identify elements in the previous work of the Commission that could be particularly relevant to the topic "Formation and evidence of customary international law".

After addressing, in the introduction, a few preliminary issues regarding the Commission's mandate and its previous work on the topic of "Ways and means for making the evidence of customary international law more readily available", the memorandum turns to the Commission's approach to the identification of customary international law and the process of its formation by focusing on (a) the Commission's general approach; (b) State practice; (c) the so-called subjective element (*opinio juris sive necessitatis*); (d) the relevance of the practice of international organizations; and (e) the relevance of judicial pronouncements and writings of publicists.

The memorandum then provides an overview of the Commission's understanding of certain aspects of the operation of customary law within the international legal system. These aspects relate to the binding nature and characteristics of the rules of customary international law — including regional rules, rules establishing *erga omnes* obligations and rules of *jus cogens* — as well as to the relationship of customary international law with treaties and "general international law".

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# I. Introduction

1. At its sixty-third session (2011), the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work.[1] At its sixty-fourth session (2012), the Commission included the topic in its current programme of work and appointed Sir Michael Wood as Special Rapporteur.[2] Also at that session, the Commission requested that the Secretariat prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[3] To fulfil that request, the Secretariat has engaged in a review of the Commission's work since 1949 with a view to identifying the aspects most relevant to customary international law. In this regard, the Secretariat has focused primarily on aspects of the Commission's work that are directly relevant to the understanding of the concept of customary international law, the manner in which customary rules emerge and ought to be identified, and the way in which customary law operates within the international legal system. Those aspects of the work of the Commission identified by the Secretariat as most relevant to the present topic are reflected herein in the form of observations and, where deemed appropriate, accompanying explanatory notes.

2. In developing this memorandum, the Secretariat drew guidance from the questions and issues identified as relevant to the topic in two preliminary documents prepared by Sir Michael Wood,[4] and in the initial debate on the topic at the Commission's sixty-fourth session.[5] The memorandum is structured to reflect aspects of the Commission's work relating to the identification of customary international law and the process of its formation, and to the operation of customary law within the international legal system.

3. It is important to note at the outset that the observations presented below reflect a systematic review of only certain components of the Commission's work. Given the Commission's mandate and working methods, numerous components of its work — including reports of Special Rapporteurs and general debates in plenary — could be of potential relevance to the present memorandum and its topic. Yet, in order to finalize the memorandum in an expedient manner, the Secretariat has largely limited its review to the final version of drafts adopted by the Commission on the various topics that it has so far considered, along with accompanying commentaries.[6] The final versions of such drafts and commentaries were thought best to reveal the Commission's collective approach to customary international law.

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[1] A/66/10, paras. 365-367. By its resolution 66/98 of 9 December 2012, the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work.

[2] A/67/10, para. 19.

[3] Ibid., para. 159.

[4] See annex A to the Commission's 2011 report (A/66/10), as well as the note of the Special Rapporteur introduced at the Commission's sixty-fourth session (A/CN.4/653).

[5] See A/67/10, paras. 169-202.

[6] The draft articles on the expulsion of aliens and commentaries thereto, adopted by the Commission on first reading at its sixty-fourth session (2012), were also included in the review.

## A. Codification and progressive development

4. Before proceeding to the observations, it is useful briefly to address a few preliminary matters relating to the Commission's previous work on customary international law. First, a study of such work inevitably calls to attention the distinction between the Commission's work on "codification" and "progressive development".

5. With respect to codification, it is well understood that customary international law has played a significant role in the Commission's work. The statute of the Commission defines "codification of international law" to mean "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".[7] Moreover, the Statute directs the Commission to codify international law by preparing drafts in the form of articles, together with a commentary containing an "adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine", together with conclusions defining, on the one hand, "the extent of agreement on each point in the practice of States and in doctrine" and, on the other hand, "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution".[8]

6. The Commission's mandate, however, is not limited to the codification of existing international rules. The Commission is also tasked with the progressive development of international law, which is defined by the statute of the Commission to mean "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".[9]

7. Codification and progressive development were thus envisioned by the statute as distinct concepts, though the drafters of the statute recognized that the two concepts would not necessarily be mutually exclusive — the systematization of existing law may lead to the conclusion that a new rule should be suggested for adoption by States.[10] Also, the Commission has consistently avoided any overarching categorization of a particular topic as exclusively an exercise in codification or progressive development.[11] Moreover, the Commission has indicated

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[7] Statute of the International Law Commission, article 15.

[8] Ibid., article 20 (a) and (b).

[9] Ibid., article 15.

[10] See the report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session, Sixth Committee*, annex 1, para. 7.

[11] See, for example, *Yearbook of the International Law Commission 1978*, vol. II (Part Two), p. 16, para. 72 ("The Commission wishes to indicate that it considers that its work on most-favoured-nation clauses constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements of both progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls."). See also *The Work of the International Law Commission*, 8th edition, vol. I, 2012, p. 47.

that the "distinctions drawn in its statute between the two concepts have proved unworkable and could be eliminated in any review of the statute".[12]

8. On a number of occasions, in relation to the formulation of specific rules, the Commission has clearly distinguished between its work on the codification and its work on the progressive development of international law.[13] Yet, on many other occasions, the Commission has not indicated whether its contemplation of a particular rule represented an exercise in codification or progressive development.[14] Moreover, regardless of whether or not the Commission has identified its consideration of a particular rule as falling within either category, it has often not employed terms that would make its analysis plainly relevant to customary law. Thus, the Secretariat's approach has been to include in the present memorandum those elements of the Commission's work that appear to constitute an effort to ascertain or assess the possible existence or emergence of a rule of customary international law.

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[12] *Yearbook ... 1996*, vol. II (Part Two), p. 84, para. 147 (a). See also pp. 86-87, paras. 156-159, indicating that it is "too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions" and "thus the Commission has inevitably proceeded on the basis of a composite idea of 'codification and progressive development'".

[13] See, for example, *Yearbook ... 1978*, vol. II (Part Two), p. 13, para. 54 ("The Commission found that the operation of the [most-favoured-nation] clause in the sphere of economic relations, with particular reference to developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in the [Statute] because the requirements for that process, ... namely, extensive State practice, precedents and doctrine, were not easily discernible."); para. (2) of the commentary to draft article 5 on diplomatic protection, A/61/10, p. 36 (indicating that State practice and doctrine are unclear, and thus the rule has been drafted in an exercise in progressive development of the law); para. (2) of the commentary to draft article 8 on diplomatic protection, A/61/10, p. 48 ("Draft article 8, an exercise in progressive development of the law, departs from the traditional rule ..."); and para. (5) of the commentary to draft article 19 on diplomatic protection, A/61/10, p. 96 ("If customary international law has not yet reached this stage of development, then draft article 19, subparagraph (a), must be seen as an exercise in progressive development."); para. (1) of the commentary to guideline 1.1.5 on reservations to treaties, A/66/10/Add.1, p. 73 (indicating that the guideline "appears to be an element of progressive development of international law, since there is no clear precedent in this regard"); para. (5) of the commentary to draft article 23 on the expulsion of aliens, A/67/10, p. 58 ("Consequently, paragraph 2 of draft article 23 constitutes progressive development in two respects ..."); para. 1 of the commentary to draft article 27 on the expulsion of aliens, A/67/10, p. 71 ("Draft article 27 ... is progressive development of international law."); and para. (1) of the commentary to draft article 29 on the expulsion of aliens, A/67/10, p. 73 ("Draft article 29 recognizes, as an exercise in progressive development and when certain conditions are met, that an alien who has had to leave the territory of a State owing to an unlawful expulsion has the right to re-enter the territory of the expelling State."). See also para. (5) of the general comments on the responsibility of international organizations, A/66/10, p. 70 ("The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.").

[14] Indeed, the Commission has even stated that it did not consider it necessary to identify the legal status of a particular rule; see, for example, para. (8) of the commentary to draft article 68 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 298 ("The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal State [over the continental shelf] ... All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission.").

### B. Ways and means for making the evidence of customary international law more readily available

9. The topic "Formation and evidence of customary international law" is not the first occasion on which the Commission has addressed a topic concerned directly with the evidence of customary international law. Following its second session, and on the basis of a working paper prepared by Manley O. Hudson on the subject,[15] the Commission submitted a report in 1950 to the General Assembly on the topic entitled "Ways and means for making the evidence of customary international law more readily available".[16] That report was in direct response to article 24 of the Commission's statute.[17]

10. The Commission's implementation of article 24 was, to a significant extent, conceptually distinct from the topic under consideration here. Concerned primarily with the availability and accessibility of materials relevant to the evidence of customary law, the report of the Commission identified existing collections of texts and international legal materials and suggested that the Secretariat prepare certain publications to increase the availability of evidence of potential relevance to international custom.[18]

11. The Commission's report did, however, also briefly consider the scope of customary international law.[19] Of particular relevance to the topic presently under consideration, the Commission suggested, inter alia, that the conventional formulation of international law by certain States is not infrequently relied upon to establish the existence of customary law, and that "evidence of the practice of States is to be sought in a variety of materials".[20] Those conclusions and other salient aspects of the Commission's analysis will be revisited as part of the observations provided below.

## II. The identification of customary international law and the process of its formation

12. The present section elaborates observations relating to the Commission's approach to the identification of the rules of customary international law and the process leading to their formation. The section begins with observations on the Commission's general approach to the identification of customary rules, and continues with observations relating to State practice, the so-called subjective element (*opinio juris sive necessitatis*) and the relevance of the practice of international organizations and judicial pronouncements and writings of publicists.

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[15] A/CN.4/16 and Add.1.

[16] *Yearbook ... 1950*, vol. II, pp. 367-374, paras. 24-94.

[17] Article 24 of the statute of the Commission provides that:

> The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

[18] *Yearbook ... 1950*, vol. II, pp. 368-374.

[19] Ibid., pp. 367-368.

[20] Ibid.

## A. General approach

### Observation 1

**To identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists.**[21]

13. The commentary to draft article 5 on the law of the non-navigational uses of international watercourses exemplifies the Commission's approach:

> A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses — including treaty provisions, positions taken by States in tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases — reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law."[22]

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[21] In so doing, the Commission has relied upon a variety of materials, an illustrative list of which is provided in sections II.B.2 and II.C.2 of the present memorandum. See also, for example, the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 211-214: upon review of a variety of materials, the Commission concluded, at para. (18), that "a newly independent State is not, *ipso jure*, bound to inherit its predecessor's treaties". On some occasions, considerations of logic or fairness have also been relied upon by the Commission to identify certain rules; see, for example, para. (2) of the commentary to draft article 36 on the representation of States in their relations with international organizations, *Yearbook ... 1971*, vol. II (Part One), p. 308 (assessment of relevant practice corroborated by an analogy between the privileges and immunities of diplomatic agents and those of permanent representatives, as well as their respective family members and staff), and para. (2) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 110 ("Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury — but nothing more — arising in consequence of the internationally wrongful act. *It is also consistent with fairness as between the responsible State and the victim of the breach.*" (emphasis added)). In certain cases, recourse to analogy would appear to have resulted from the Commission's determination of a scarcity of available practice; see, for example, the following observations made in para. (2) of the general commentary to the draft articles on the responsibility of international organizations dealing with circumstances precluding wrongfulness, A/66/10, p. 111: "Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States."

[22] Para. (10) of the commentary to draft article 5, *Yearbook ... 1994*, vol. II (Part Two), p. 98. See also paras. (3) to (6) of the commentary to draft article 7 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), pp. 45-46 (relying on a review of State practice, international jurisprudence and the writings of jurists to find that a rule is established); paras. (12) to (14) of the commentary to draft article 10 on the responsibility of

14. The above example usefully illustrates that the Commission has often not clearly distinguished in its commentaries between the materials relied upon to identify the general practice of States and those relied upon to determine the attitudes or positions of States in regard to a rule.[23] It is also useful to note that the Commission has recognized that the various sources referred to in the identification of rules of customary international law are not of the same legal value.[24]

15. On other occasions, however, the Commission has concluded that a rule was supported by State practice without including in the commentaries evidence of a systematic survey.[25]

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States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), pp. 51-52 ("Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10."); paras. (24) and (25) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 40 (determining that the rule formulated in the draft article found precedent in a survey of sources which included judicial decisions, national legislation and treaty practice); paras. (10) to (18) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 199-201 (engaging in a review of State practice, boundary disputes and treaty practice to ascertain the existence of a general rule); paras. (2) to (4) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 211-214 (reviewing State practice, legal opinion of the Secretariat, practice of depositaries and writings of jurists to establish a general rule); paras. (1) and (8) of the commentary to draft article 49 on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 246-247 (relying on the Charter of the United Nations and practice of the United Nations, as well as the opinion of a great majority of international lawyers, in discussing a customary rule); and para. (2) of the commentary to draft article 25 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 213 ("State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the ... rule which is formulated in the present article.").

[23] For a more detailed examination of the Commission's treatment of the general practice of States and the attitudes or positions of States vis-à-vis a rule, see sections II.B and II.C below. See also para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 53 (concluding that "the rules enunciated ... are supported by State practice, both judicial, legislative and governmental, as well as by multilateral and bilateral treaties", without engaging in separate analysis in the commentary regarding the practice and attitude of States); paras. (11) to (21) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), pp. 33-35 (providing demonstrative examples and concluding that a rule is grounded in State practice, judicial decisions and legal theory, without distinguishing between materials relied upon to reach its conclusion with respect to State practice, attitudes or positions).

[24] See para. (24) of the commentary to draft article 5 on the law of the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), p. 100 ("The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value. However, the survey does provide an indication of the wide-ranging and consistent support for the rules contained in article 5.").

[25] See, for example, para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 276 (stating simply that rules "followed the preponderant practice of States", without any further elaboration in the commentary); commentary to draft article 32 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 280 (concluding that the principle on the immunity of warships "embodied in paragraph 1 is generally accepted in international law", without providing a survey of evidence); and paras. (1) and (2) of the commentary to draft article 16 on consular relations, *Yearbook ... 1961*, vol. II, p. 103 (concluding that "according to a very widespread practice, career consuls have precedence over honorary consuls", without

## B. State practice

16. In its identification of rules of customary international law, the Commission has recognized that State practice plays a prominent role.[26] This section seeks to provide an overview of the manner in which State practice has been characterized and assessed by the Commission, as well as the materials relied upon by the Commission in its analysis.

### 1. The Commission's characterization of State practice

#### Observation 2

**The uniformity of State practice has been regarded by the Commission as a key consideration in the identification of a rule of customary international law.**

17. On several occasions, the Commission has found that the requisite uniformity of State practice was present to allow for the identification of a rule of customary international law.[27] Conversely, on some occasions, a lack of uniformity has been regarded as precluding the existence of a rule of customary international law.[28]

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referring to any sources in the commentary). It should be mentioned, however, that in some of those instances in which there is no evidence of a systematic survey in the Commission's commentaries, indications of such a survey may well appear in Special Rapporteurs' reports or in Secretariat studies.

[26] It should be noted, however, that the Commission has found that the mere absence of practice did not necessarily preclude the existence of a right or entitlement under general customary international law; see para. (2) of the commentary to draft article 57 on the responsibility of international organizations, A/66/10, p. 157 ("In fact, practice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.").

[27] See para. (1) of the commentary to draft article 9 on consular relations, *Yearbook ... 1961*, vol. II, p. 99 ("At present, the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 9 to enable the classes of heads of consular posts to be codified.") and paras. (1) and (2) of the commentary to draft article 16 on consular relations, *Yearbook ... 1961*, vol. II, p. 103 ("There would appear to be, as far the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify. It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls."). See also paras. (8) and (23) of the commentary to guideline 4.5.1 on reservations to treaties, A/66/10/Add.1, pp. 511 and 517 ("The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice ... State practice is extensive — and essentially homogeneous — and is not limited to a few specific States.").

[28] See, for example, para. (4) of the commentary to draft article 35 on special missions, *Yearbook ... 1967*, vol. II, p. 363 ("The Commission noted however, that [consumer] goods are subject to complicated customs regulations which vary from State to State and that there does not appear to be any universal legal rule on the subject."); para. (2) of the commentary to draft article 17 on diplomatic intercourse and immunities, *Yearbook ... 1958*, vol. II, p. 94 ("Usage differs from country to country ... It is not possible to lay down a hard-and-fast rule."); para. (2) of the commentary to draft article 36 on diplomatic intercourse and immunities, *Yearbook ... 1958*, vol. II, p. 101 ("It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of

**Observation 3**

**The generality of State practice has also been regarded by the Commission as a key consideration in the identification of a rule of customary international law.**

18. On several occasions, the Commission has found that the requisite generality of State practice was present to allow for the identification of a rule of customary international law.[29] Conversely, the lack of generality of State practice has been

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mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities ... In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned."); draft article 3 (1) on the law of the sea, *Yearbook ... 1956*, vol. II, p. 265 ("The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea."); para. (2) of the commentary to draft article 4 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 267 ("The traditional expression 'low-water mark' may have different meanings; there is no uniform standard by which States in practice determine this line."); para. (18) of the commentary to draft article 14 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 41 ("The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State ..."); paras. (8) and (9) of the commentary to draft article 11 on consular relations, *Yearbook ... 1961*, vol. II, p. 101 (indicating that the "universally recognized" right of a receiving State to refuse the *exequatur* is implicitly recognized in the article, but noting that "in view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring States to give the reasons for their decisions in such a case."); para. 1 of draft article 27 on the expulsion of aliens, A/67/10, p. 71 ("The Commission considers that State practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against an expulsion decision."); and para. 1 of the commentary to draft article 29 on the expulsion of aliens, A/67/10, p. 73 ("Although recognition of such a right — on a variety of conditions — may be discerned in the legislation of some States and even at the international level, practice does not appear to converge enough for it to be possible to affirm the existence, in positive law, of a right to readmission, as an individual right of an alien who has been unlawfully expelled.").

[29] See, for example, para. (1) of the commentary to draft article 3 on consular relations, *Yearbook ... 1961*, vol. II, p. 94 ("[T]he rule laid down in the present article corresponds to the general practice according to which diplomatic missions exercise consular functions."); para. (1) of the commentary to draft article 49 on consular relations, *Yearbook ... 1961*, vol. II, p. 121 (indicating that evidence of "a very widespread practice ... may be regarded as evidence of an international custom ..."); paras. (8) and (23) of the commentary to guideline 4.5.1 on reservations to treaties, A/66/10/Add.1, pp. 511 and 517 ("The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice ... State practice is extensive — and essentially homogeneous — and is not limited to a few specific States."); para. (1) of the commentary to draft article 32 on diplomatic intercourse and immunities, *Yearbook ... 1958*, vol. II, p. 100 ("In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemptions exists, subject to certain exceptions."); para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 276 ("It considered that these rules followed the preponderant practice of States and it therefore formulated article 22 accordingly."); and para. (105) of the commentary to Principle IV of the principles of international law which were recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook ... 1950*, vol. II, p. 375 (indicating that a principle is "found in varying degrees in the criminal law of most nations").

regarded as precluding the existence of a rule of customary international law.[30] On certain occasions, however, with respect to the identification of rules governing situations that had arisen in a limited number of cases, such as the law on State succession, the Commission has relied heavily upon the practice of the States involved in those cases in order to identify or formulate a general rule.[31]

19. In other instances, the Commission has found that the speciality of State conduct or of a particular circumstance undermined its probative value for the purpose of identifying a rule of customary international law.[32]

**Observation 4**

**The Commission has employed diverse terminology when determining whether State practice satisfies the requirements of uniformity or generality.**

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[30] See paras. (3) and (6) of the commentary to draft article 54 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), pp. 137 and 139 ("Practice on this subject is limited and rather embryonic ... As this review demonstrates, the current State of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States."); para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 53 (stating that practice found in common-law systems should not be regarded as a "universally applicable practice"); and para. (4) of the commentary to guideline 2.6.10 on reservations to treaties, A/66/10/Add.1, p. 265 ("State practice regarding the confirmation of objections is sparse and inconsistent ...").

[31] See para. (18) of the commentary to draft article 9 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 193 (identifying a rule of general scope on the basis of the practice of certain newly independent States), and para. 26 of the commentary to draft article 32 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 258 (relying on the limited practice of a few unified States to formulate a general rule); see also paras. (4) to (6) of the commentary to draft article 5 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), pp. 24-25 (relying on limited international tribunal practice to reaffirm an "existing rule of international law"), and paras. (1) to (3) of the commentary to draft article 6 of the draft Code of crimes, *Yearbook ... 1996*, vol. II (Part Two), p. 25 (relying on limited national and international jurisprudence to confirm a principle).

[32] See para. (7) of the commentary to draft article 21 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 231 ("But the cases of the former British Dominions were very unusual owing both to the circumstances of their emergence to independence and to their special relation to the British crown at the time in question. Accordingly, no general conclusion should be drawn from these cases ..."); para. (7) of the commentary to draft article 29 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 250 (indicating that the circumstances of a federation were "somewhat special" and thus "not thought to be a useful precedent from which to draw any general conclusions"); para. (11) of the commentary to draft article 34 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 262 ("[T]he facts concerning that extremely ephemeral federation are thought to be too special for it constitute a precedent from which to derive any general rule."); para. (4) of the commentary to draft article 8 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 25 (stating that "no generally applicable criteria ... can be deduced from", inter alia, "two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations."); and para. (13) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 33 (omitting two cases as "not sufficiently illustrative" as their application of a general principle was "due to other causes of a peculiar and specific kind").

20. Such terminology included "uniformity" or "uniform practice",[33] "general practice",[34] "widespread practice",[35] a rule "widely observed in practice",[36] "well-established and generalized practice",[37] "well-established practice",[38] "clearly established" practice,[39] "solidly established" practice,[40] "established practice",[41] "settled practice",[42] "preponderant practice of States",[43] or the "weight of evidence of State practice".[44]

**Observation 5**

**Where there was a unifying thread or theme[45] underlying international practice, a certain variability in practice has often not precluded the Commission from identifying a rule of customary international law.[46]**

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[33] See para. (1) of the commentary to draft article 9 on consular relations, *Yearbook ... 1961*, vol. II, p. 99 (referring to the "degree of uniformity" in State practice); para. (2) of the commentary to draft article 36 on diplomatic intercourse and immunities, *Yearbook ... 1958*, vol. II, p. 101 ("But beyond this there is no uniformity in the practice of States ..."); para. (2) of the commentary to article 3 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 265 ("... international practice was not uniform ..."); and para. (7) of the commentary to article 3 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 266 ("... international practice was far from uniform").

[34] See para. (1) of the commentary to draft article 3 on consular relations, *Yearbook ... 1961*, vol. II, p. 94; para. 6 of the commentary to draft article 22 on the succession of States in respect to treaties, *Yearbook ... 1974*, vol. II (Part One), p. 234; and para. 2 of the commentary to draft article 52 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 250.

[35] See para. (1) of the commentary to draft article 49, para. (2) of the commentary to draft article 16 and para. (2) of the commentary to draft article 41 on consular relations, *Yearbook ... 1961*, vol. II, pp. 121, 103 and 115.

[36] See para. (2) of the commentary to guideline 2.3 on reservations to treaties, A/66/10/Add.1, p. 173.

[37] See para. (1) of the commentary to draft article 8 on the representation of States in their relations with international organizations, *Yearbook ... 1971*, vol. II (Part One), p. 291.

[38] See, for example, para. (3) of the commentary to guideline 1.8 on reservations to treaties, A/66/10/Add.1, p. 131; para. (12) of the commentary to guideline 3.1.5.3 on reservations to treaties, A/66/10/Add.1, p. 373; and para. (4) of the commentary to draft article 50 on the representation of States in their relations with international organizations, *Yearbook ... 1971*, vol. II (Part One), p. 315.

[39] See para. (12) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 33.

[40] See para. (8) of the commentary to guideline 4.5.1 on reservations to treaties, A/66/10/Add.1, p. 511.

[41] See para. (1) of the commentary to draft article 21 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 61.

[42] See para. (8) of the commentary to draft article 19 on diplomatic protection, A/61/10, p. 100 ("Although there is some support ... in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice").

[43] See para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 276.

[44] See para. (17) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 201 (referencing "the weight of the evidence of State practice" in support of excepting boundary treaties from the fundamental change of circumstances rule).

[45] See para. (11) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), p. 98, indicating that, although the language and approaches of international agreements reflecting the doctrine of equitable utilization — which was characterized by the Commission as a "general rule of law" — "vary considerably,

21. For instance, in the commentary to draft article 34 on the succession of States in respect of treaties, the Commission concluded that

> although some discrepancies might be found in State practice, still that practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force *ipso jure* with respect to each State emerging from the dissolution.[47]

22. Similarly, in its commentary to draft article 32 on diplomatic intercourse and immunities, the Commission noted that, "although the degree of exemption [from certain duties and taxes] varies from country to country, it may be regarded as a rule of international law that such exemptions exist, subject to certain exceptions".[48]

**Observation 6**

> **The consistency of State practice over time has occasionally been invoked by the Commission as a relevant, though not necessarily decisive, consideration in the formation or evidence of customary international law.**[49]

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*their unifying theme* is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application". (Emphasis added.)

[46] On the Commission's general approach to the requirement of uniformity of State practice, see observation 2 in section II.B.1 of the present memorandum.

[47] Para. (25) of the commentary to draft article 34 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 265.

[48] Para. (1) of the commentary to draft article 32 on diplomatic intercourse and immunities, *Yearbook ... 1958*, vol. II, p. 100. See also para. (3) of the commentary to draft article 29 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 279 ("Existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission ... The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag ... [T]he majority of the Commission preferred a vague criterion to no criterion at all."); para. (8) of the commentary to draft article 30 on consular relations, *Yearbook ... 1961*, vol. II, pp. 109-110 (affirming the inviolability of the consular premises, noting in particular its recognition in numerous consular conventions, despite "certain exceptions to the rule of inviolability" found in some conventions); para. (3) of the commentary to draft article 13 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 201 (commenting that the *Right of Passage* case may indicate "the possibility that difficult problems may arise under the rule in special circumstances", but that "the existing rule appears to be well-settled"); and paras. (2) and (3) of the commentary to draft article 11 on the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 34 ("Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions", every court or tribunal must comply with the "minimum international standard of due process").

[49] See, for example, para. (18) of the commentary to draft article 5 on consular relations, *Yearbook ... 1961*, vol. II, p. 98 ("Paragraph (*j*) confirms a long-established practice whereby consuls ensure the service on the persons concerned ..."); paras. (4) and (6) of the commentary to draft article 5 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), pp. 24-25 (determining that the article reaffirms an "existing rule of international law" and indicating that "the defence of superior orders has been consistently excluded in the relevant legal instruments adopted since the Charter of the Nürnberg Tribunal ..."); para. (4) of the commentary to draft article 7 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 27

## 2. Materials relied upon by the Commission in assessing State practice

### Observation 7

**The Commission has relied upon a variety of materials in assessing State practice for the purpose of identifying a rule of customary international law.**

23. In its work, the Commission appears to have followed the approach originally envisaged in its 1950 report to the General Assembly on ways and means for making the evidence of customary international law more readily available.[50] A non-exhaustive list of materials upon which the Commission has relied as elements of State practice includes internal law,[51] municipal court decisions,[52] practice of the executive branch,[53] diplomatic practice[54] and treaty practice.[55]

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("The official position of an individual has been consistently excluded as a possible defence to crimes under international law in the relevant instruments adopted since the Charter of the Nürnberg Tribunal ..."); and para. (26) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission in its commentary to the corresponding article 5 of the final version of the draft articles on the topic as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two), pp. 22-23), *Yearbook ... 1980*, vol. II (Part Two), pp. 147-148 ("It should be observed ... that the rule of State immunity, which was formulated in the early nineteenth century and was widely accepted in common law countries as well as in a large number of civil law countries in Europe in that century, was later adopted as a general rule of customary international law solidly rooted in the current practice of States. Thus the rule of State immunity continues to be applied, to a lesser or greater extent, in the practice of the countries whose case law in the nineteenth century has already been examined ... Its application seems to be consistently followed in other countries."). See also, *a contrario*, para. (3) of the commentary to draft article 54 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 137 ("Practice on this subject is limited and rather embryonic.").

[50] See *Yearbook ... 1950*, vol. II, p. 368, para. 31 ("Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to 'documents concerning State practice' (*documents établissant la pratique des Etats*) supplies no criteria for judging the nature of such 'documents'. Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations."). In that report, the Commission provided the following non-exhaustive list of the types of materials that are of potential relevance to the evidence of customary international law: (a) texts of international instruments; (b) decisions of international courts; (c) decisions of national courts; (d) national legislation; (e) diplomatic correspondence; (f) opinions of national legal advisers; and (g) practice of international organizations (*Yearbook ... 1950*, vol. II, p. 370). Notably, the Commission indicated that "national legislation" is "employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded" (p. 370 (in subsection on "national legislation"), para. 60). In addition, the Commission noted that "the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law" (para. 54). The Commission declined, however, to assess "the relative value of national court decisions as compared with other types of evidence of customary international law" (para. 54).

[51] See, for example, para. (19) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), pp. 38-39 (engaging in a survey of national legislation); para. (8) of the commentary to article 19 on diplomatic protection, A/61/10, p. 100 ("Although there is some support ... in national legislation, judicial decisions and doctrine, this probably does not constitute a settled

practice."); para. (13) and note 164 of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two) (indicating that rules are supported by State practice, including legislative practice); and paras. (40) to (48) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two), pp. 22-23), *Yearbook ... 1980*, vol. II (Part Two), pp. 152-153 (indicating that "national legislation constitutes an important element in the overall concept of State practice" and engaging in a review of relevant internal laws).

[52] See paras. (13) to (18) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), pp. 36-38 (survey of national judicial practice); para. (13) and note 164 of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), pp. 52-53 (indicating that rules are supported by State practice, including judicial practice); para. (7) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two), pp. 22-23), *Yearbook ... 1980*, vol. II (Part Two), p. 143 ("The general rule of international law regarding State immunity has developed principally from the judicial practice of States. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection."); and para. (3) of the commentary to draft article 59 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 257 (referring to the practice of municipal courts).

[53] See para. (39) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two), pp. 22-23), *Yearbook ... 1980*, vol. II (Part Two), pp. 151-152 ("The views of the Government, expressed through its political branch, are highly relevant and indicative of the general trends in the practice of States ... The lead taken by the Government may be decisive in bringing about desirable legal developments through forceful assertion of its position or through the intermediary of the legislature or by way of governmental acceptance of principle contained in an international convention. Conversely, the Government is clearly responsible for its decision to assert a claim of State immunity in respect of itself and its property, or to consent to the exercise of jurisdiction by the court of another state or to waive its sovereign immunity in a given case."); and para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 53 (indicating that rules enunciated in the article are supported by State practice, including governmental practice).

[54] See paras. (14) to (17) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 185-186 (considering the diplomatic positions, exchanges and practice of States to ascertain whether a general rule exists), and paras. (11) to (17) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 200-202 (analysing diplomatic exchanges and positions in boundary disputes as evidence of State practice on the question of whether boundary settlements are affected by a succession of States). See also *Yearbook ... 1950*, vol. II, p. 371, para. 71 ("The diplomatic correspondence between Governments must supply abundant evidence of customary international law.").

[55] See paras. (20) and (21) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 39 (indicating that the "accumulation of such bilateral treaty practices could combine to corroborate the evidence of the existence of a general practice of States in support of" certain exceptions to State immunity); paras. (14) to (18) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 213-214 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule);

24. Furthermore, the Commission has relied upon other materials as secondary sources of information regarding State practice. These materials include, in particular, Government comments,[56] publications of international organizations[57] and non-governmental organizations,[58] executive branch publications[59] and international judicial decisions and the writings of jurists.[60]

25. The Commission has also noted the difficulty of identifying and assessing relevant instances of State practice with respect to a particular legal issue.[61]

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para. (1) of the commentary to draft article 15 and para. (5) of the commentary to draft article 19 on consular relations, *Yearbook ... 1961*, vol. II, pp. 103 and 105 (citing consular conventions as evidence of practice of States); and paras. (1) and (3) of the commentary to draft article 28 on consular relations, *Yearbook ... 1961*, vol. II, p. 108 (indicating that the rule is confirmed by numerous consular conventions).

[56] The Commission and its special rapporteurs routinely rely on comments received from Governments as one of the main sources of information regarding State practice. Indications of such reliance can be found in certain commentaries; see, for example, para. (1) of the commentary to draft article 56 on consular relations, *Yearbook ... 1961*, vol. II, p. 124 ("A study of consular regulations has shown, and the comments of governments have confirmed, that some States permit their career consular officials to carry on private gainful occupation.... It was in light of this practice that the Commission ... adopted this article ..."); and para. (5) of the commentary to draft article 7 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 26 ("Express reference to absence of consent as a condition *sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to Member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.").

[57] See, for example, para. (1) of the commentary to draft article 23 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 76 (citing a study of State practice on force majeure prepared by the Secretariat); para. (16) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 36 (citing State practice of Egypt found in a United Nations publication); para. (27) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 203 (citing the Nile Waters Agreement of 1929 and other bilateral agreements reproduced in a United Nations publication); and para. (4) of the commentary to draft article 19 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 223 (citing a United Nations publication in support of a proposition regarding the practice of successor States).

[58] See, for example, paras. (10) and (12) of the commentary to draft article 9 on the succession of States in respect of treaties (citing International Law Association materials), para. (7) of the commentary to draft article 23 (citing a report of the International Law Association) and para. (17) of the commentary to draft articles 30 and 31 (citing a report of the Nigerian Institute for International Affairs), *Yearbook ... 1974*, vol. II (Part One), pp. 191-192, 237-238 and 256.

[59] See, for example, para. (2) of the commentary to draft article 24 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 79 (citing diplomatic exchanges reproduced in a publication of the Government of the United States of America); para. (3) of the commentary to draft article 32 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 94 (citing State practice found in the *British and Foreign State Papers, 1919*, vol. 112); and para. (4) of the commentary to draft article 14 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 208-209 (referring to treaty practice found in a publication of the Government of the United Kingdom).

[60] See section II.E below.

[61] See para. (4) of the commentary to the annex to the draft articles on the effects of armed conflicts on treaties (concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), A/66/10, p. 199 ("... the likelihood of a substantial flow of information

## C. The so-called subjective element (*opinio juris sive necessitatis*)

26. In addition to State practice, the Commission has frequently referred in its work to what is often defined as the subjective element of customary international law.[62] This section seeks to provide an overview of the manner in which this element has been characterized and assessed by the Commission, as well as the materials relied upon by the Commission in its analysis.

### 1. The Commission's characterization of the subjective element

**Observation 8**

**The Commission has often characterized the subjective element as a sense among States of the existence or non-existence of an obligatory rule.[63] While on many occasions the Commission has specifically relied upon a rule's obligatory character,[64] in certain instances the Commission referred to States' recognition of the necessity of a rule.[65]**

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from States, indicating evidence of State practice, is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult").

[62] See, for example, para. (8) of the commentary to guideline 2.2.1 on reservations to treaties, A/66/10/Add.1, p. 167 (relying on practice and *opinio necessitatis juris* to support the rule that reservations formulated at signature need to be confirmed while expressing consent to be bound); and para. (18) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two) pp. 22-23), *Yearbook ... 1980*, vol. II (Part Two), p. 145 (referring to the *opinio juris* underlying State practice on jurisdictional immunity).

[63] The phrase "the existence or non-existence of an obligatory rule" should be read with the understanding that rules of customary international law may be both permissive (recognizing States' rights or discretion) and restrictive (imposing obligations on States). Examples of explicit reference by the Commission to a permissive rule include para. (1) of the commentary to draft article 67 on consular relations, *Yearbook ... 1961*, vol. II, p. 127 (rule according to which each State is free to decide whether it will appoint or receive honorary consular officials); para. (11) of the commentary to draft article 7 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 28 ("Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent."); paras. (7) and (12) to (17) of draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 212-214 (evidence of State practice supports the traditional view that a newly independent State is not under any general obligation to take over the treaties of its predecessor; see in particular para. (12) *in fine:* "Here the notion of succession seems to have manifested itself in the recognition of a new State's *right* to become a party without at the same time seeking to impose upon it an *obligation* to do so." (emphasis in the original)).

[64] See paras. (3) to (5) and (9) of the commentary to draft articles 27 ("General rule of interpretation") and 28 ("Supplementary means of interpretation") on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 218-220, in particular para. (4) ("recourse to many of these principles is discretionary rather than obligatory") and para. (9) ("... But these elements are all of an obligatory legal character"); and para. (8) of the commentary to draft article 19 on diplomatic protection, A/61/10, p. 100 ("Nor is there any sense of *obligation* on the part of States to limit their freedom of disposal of compensation awards ..." (emphasis added)).

**Observation 9**

**The position of States vis-à-vis a possible rule of customary international law has often been characterized by the Commission as "general recognition" or "general acceptance" of the rule. The Commission, however, has also used other formulations, such as "belief" or "attitude" of States with regard to the existence or content of a given rule.**

27. In its work, the Commission has, on several occasions, alluded to the so-called subjective element of customary international law by indicating that a rule was "generally (or widely) recognized"[66] or "generally accepted".[67] In considering the notion of "general acceptance", the Commission explained its understanding of the dynamics of claims and acceptances that had led to the emergence of a particular rule of customary international law.[68] In certain instances, the Commission has

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[65] See, for example, para. (6) of the commentary to draft article 59 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 258 ("... the acceptance of the [*rebus sic stantibus*] doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties"); and para. (9) of the commentary to draft article 20 on the law of non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), p. 120.

[66] See, for example, para. (1) of the commentary to draft article 30 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 226 (indicating the existence of "abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists"); para. (4) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 110 ("The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature and in State practice."); para. (2) of the general commentary on countermeasures, *Yearbook ... 2001*, vol. II (Part Two), p. 128 ("It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances"); and para. (2) of the commentary to draft article 51, *Yearbook ... 2001*, vol. II (Part Two), p. 134 ("Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence ...").

[67] See, for example, para. (1) of the commentary to draft article 15 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 202 (obligation ... "generally accepted"); para. (3) of the commentary to draft article 1 on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook ... 1972*, vol. II, p. 313 (indicating that the extension to cabinet officers of the principle of special protection at all times and in all circumstances when in a foreign State "could not be based on any broadly accepted rule of international law..."); para. (35) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 206 ("general acceptance" — together with the "strong indications of a belief"); and para. (28) of the commentary to guideline 4.5.1 on reservations to treaties, A/66/10/Add.1, p. 519 ("general agreement" of States, courts and treaty bodies relied upon in support of a rule stating that invalid reservations produce no legal effect).

[68] See para. (2) of the commentary to guiding principle 9 applicable to unilateral declarations of States capable of creating legal obligations, A/61/10, para. 177, pp. 379-380:

> The 1945 Truman Proclamation, by which the United States of America aimed to impose obligations on other States or, at least, to limit their rights on the American continental shelf, was not strictly speaking accepted by other States. All the same, as the Court has stressed, "this régime [of the continental shelf] furnishes an example of a legal theory derived from a particular source that has secured a general following. [Note 978: *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, p. 53, para. 100.] In fact, the other States responded to the Truman Proclamation with analogous claims and declarations [Note 979:

referred to the subjective element by employing different terminology, such as the "belief"[69] or "attitude"[70] of States regarding the existence or content of a rule.

**Observation 10**

**The Commission has, on some occasions, distinguished between the subjective element of a rule of customary international law and other considerations that might animate State conduct or positions.**

28. In particular, the Commission found on some occasions that States' conduct or positions were animated by considerations other than the recognition or acceptance of, or belief in, the existence of a legal rule. Such other considerations identified by the Commission include courtesy,[71] political expediency, will or compromise,[72] precautionary measures,[73] expressions of intent[74] and aspirations or preferences.[75]

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See the case of Mexico, A/CN.4/577, para. 132.] and, shortly thereafter, the content of the Proclamation was taken up in article 2 of the 1958 Geneva Convention on the Continental Shelf. It could therefore be said to have been generally accepted and it marked a point of departure for a customary process leading, in a very short time, to a new norm of international law. The International Court of Justice remarked in that context: "The Truman Proclamation however, soon came to be regarded as a starting point of the positive law on the subject, and the chief doctrine it enunciated ... came to prevail over all others, being now reflected in article 2 of the 1958 Geneva Convention on the Continental Shelf." [Note 980: *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, para. 47.]

[69] See para. (35) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 206 (alluding to "strong indications of a belief" along with "general acceptance").

[70] See para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 257 ("The most illuminating indications as to the attitude of States regarding the principle [*of rebus sic stantibus*] are perhaps statements submitted to the Court ...").

[71] See para. (1) of the commentary to Part II of the draft articles on special missions, *Yearbook ... 1967*, vol. II, p. 358 ("Before the Second World War, the question whether the facilities, privileges and immunities of special missions have a basis in law or whether they are accorded merely *as a matter of courtesy* was discussed in the literature and raised in practice. Since the War, the view that there is a *legal basis* has prevailed. It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members." (emphasis added)). See also para. (2) of the commentary to the annex to the draft articles on the representation of States in their relations with international organizations ("matter of courtesy", *Yearbook ... 197!*, vol. II (Part One), p. 335).

[72] See paras. (1), (8), (9) and (20) of the commentary to draft article 25 on the succession of State in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), pp. 54-56 and 59-60 (in particular, "(1) ... political solutions that reflected relationships of strength between victors and vanquished rather than equitable solutions", p. 54; and "(8) ... solutions ... based on a 'given power relationship'", p. 55); para. (36) of the commentary to draft article 35, *Yearbook ... 1981*, vol. II (Part Two), p. 90 (role played by "political considerations or considerations of expediency"; "... there is a strong presumption that that is not a context in which States express their free consent or are inclined to yield to the demands of justice, of equity, or even of law"); and para. (63) of the commentary to draft article 36 on the same subject, *Yearbook ... 1981*, vol. II (Part Two), p. 104 ("State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles ..."); and paras. (4) to (15) of the commentary to draft article 23 on the succession of States in respect of treaties, particularly paras. (8), (12) and (15), *Yearbook ... 1974*, vol. II (Part One), pp. 238-240 (instances of succession to bilateral treaties regarded by the Commission as having an "essentially voluntary character" — para. (12); the Commission did not believe that continuity of treaties derives "from a customary legal rule rather than the will of the States

**Observation 11**

**On some occasions, the Commission appears to have ascribed importance to the absence of opposition to a rule in the practice of States.**[76]

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concerned" — para. (8)). But see paras. (17) and (18) of commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two), pp. 22-23), suggesting that consent does not undermine a customary rule which is supported by usage and *opinio juris* ("The principle of State immunity, which was later to become widely accepted in the practice of States, was clearly stated by Chief Justice Marshall: '... This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.'" ... "In this classic statement of the rule of State immunity, *the granting of jurisdictional immunity was based on the consent of the territorial State as tested by common usage and confirmed by the* opinio juris *underlying that usage.*" (emphasis added), *Yearbook ... 1980*, vol. II (Part Two), p. 145.

[73] See para. (4) of commentary to guideline 2.6.10 ("Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation") on reservations to treaties, A/66/10/Add.1, p. 266 (considering that confirmations of objections in such cases as found in State practice "are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*)").

[74] See para. (7) of the commentary to draft article 30 on the most-favoured-nation clauses, *Yearbook ... 1978*, vol. II (Part Two), p. 73 ("While all these developments may show that there might be a tendency among States to promote the trade of developing countries through 'differential treatment', the conclusion of the Commission is that this tendency has not yet crystallized sufficiently to permit it to be embodied in a clear legal rule that could find its place among the general rules on the functioning and application of the most-favoured-nation clause. *All the texts partially quoted above are substantially expressions of intent rather than obligatory rules.* ..." (emphasis added).

[75] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, A/61/10, pp. 141-142 (referring to principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration, the Commission noted: "While the principles in these Declarations are not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community.").

[76] See, for example, para. (32) of commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two), pp. 22-23): "The preceding survey of the judicial practice of common law jurisdictions and civil law systems in the nineteenth century and of other countries in the contemporary period indicates a uniformity in the acceptance of the rule of State immunity. While it would be neither possible nor desirable to review the current case law of all countries, which might uncover some discrepancies in historical developments and actual application of the principle, ... *it should be observed that, for countries having few or no reported judicial decisions on the subject, there is no indication that the concept of State immunity has been or will be rejected.* The conclusion seems warranted that, in the general practice of States as evidence of customary law, there is little doubt that a general rule of State immunity has been firmly established as a norm of customary international law." (emphasis added), *Yearbook ... 1980*, vol. II (Part Two), p. 149. See also para. (2) of the commentary to draft article 13 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 46: "This exception [from immunity where a State owns, possesses or uses property], *which has not encountered any serious opposition in the judicial and governmental practice of States*, is formulated in language which has to satisfy the differing views of Governments ..." (emphasis added).

## 2. Materials relied upon by the Commission in assessing the subjective element

### Observation 12

**The Commission has relied upon a variety of materials in assessing the subjective element for the purpose of identifying a rule of customary international law.**

29. A non-exhaustive list of such materials includes positions of States before international organizations (including written comments and responses to questionnaires)[77] or international conferences;[78] pronouncements by municipal courts;[79] statements before international courts and tribunals;[80] stipulations in

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[77] See, for example, para. (5) of the commentary to draft article 59 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 258 (comments in political organs of the United Nations taken as statements of position regarding the acceptance of a rule of international law); para. (4) of the commentary to draft article 16 on consular relations, *Yearbook ... 1961*, vol. II, p. 103 (referring to government comments to the Commission's draft articles); and paras. (19) and (21) of the commentary to guideline 4.5.3 on reservations to treaties, A/66/10/Add.1, pp. 532 and 533 (referring to the views expressed in the Sixth Committee of the General Assembly and in written comments received from Governments as indicating lack of agreement on the approach to be taken regarding the validity of the consent to be bound expressed by the author of an invalid reservation).

[78] See, for example, para. (10) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 199 (referring to the attitude of States during the United Nations Conference on the Law of Treaties); para. (17) of the commentary to the same draft article, *Yearbook ... 1974*, vol. II (Part One), p. 201 (referring, inter alia, to "the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which established a boundary"); and para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two), p. 161 (referring, inter alia, to "declarations and resolutions adopted by intergovernmental organizations, conferences and meetings").

[79] See, for example, para. (18) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 34 ("Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property, and therefore of immovable property. This is true, in the first place, of national courts"); and para. (3) of the commentary to draft article 57 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 254 ("Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty, and they have not found it necessary to examine the conditions for the application of the principle at all closely"). See, however, para. (20) of the commentary to the annex to the draft articles on the effects of armed conflicts on treaties (concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), A/66/10, p. 204 ("In this particular context the decisions of municipal courts must be regarded as a problematic source. In the first place, such courts may depend upon guidance from the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the case law of domestic courts is not inimical to the principle of survival").

[80] See para. (7) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 198 (referring to statements before the International Court of Justice regarding succession in respect of a boundary settlement and of treaty provisions ancillary to such settlement); and para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 257 (indicating that "[t]he most illuminating indications as to the attitude of States regarding the principle [of *rebus sic*

arbitration agreements;[81] diplomatic practice and notes;[82] a State's actual conduct (as opposed to its stated positions);[83] a State's treaty practice;[84] multilateral treaty practice;[85] as well as a variety of international instruments.[86]

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*stantibus*] are perhaps statements submitted to the Court in the cases where the doctrine has been invoked", and referring to the positions of States in several cases before the Permanent Court of International Justice); paras. (3) *et seq.* of the commentary to draft article 62 on the responsibility of international organizations, A/66/10, pp. 164 ff. (referring to the positions expressed by States in contentious cases in support of the view that States members of an international organization cannot generally be regarded as internationally responsible for internationally wrongful acts of the organization).

[81] See para. (4) of the commentary to draft article 13 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 58 (common stipulation in arbitration agreements as confirmation of a "generally recognized principle").

[82] See para. (3) of the commentary to draft article 10 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 50 ("Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State"); para. (17) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 186 (citing correspondence between States); paras. (14) and (21) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 200 and 202 (referring to diplomatic notes).

[83] It has occurred that the Commission, in determining the legal position of a State, has relied upon its actual conduct even where that conduct conflicted with the State's asserted position with respect to a given rule; see para. (13) of the commentary to draft article 5 on the law of non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), pp. 98-99 ("A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every water-course State to utilize and benefit from an international watercourse in a reasonable and equitable manner. While some States have, on occasion, asserted the doctrine of absolute sovereignty, these same States have generally resolved the controversies in the context of which such assertions were made by entering into agreements that actually apportioned the water or recognized the rights of other watercourse States").

[84] See para. (20) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 39 ("The attitude or views of a Government can be gathered from its established treaty practice ... Thus the treaty practice of the Soviet Union amply demonstrates its willingness to have commercial relations carried on by State enterprises ... regulated by competent territorial authorities ..."). See also para. (1) of the commentary to draft article 15 on consular relations, *Yearbook ... 1961*, vol. II, p. 103 (referring, inter alia, to "a very large number of consular conventions"), as well para. (5) of the commentary to draft article 19 and para. (1) of the commentary to draft article 28 on the same topic (also referring to consular conventions); paras. (3) to (11) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 183-184 (considering whether devolution agreements "are effective in bringing about a succession to or continuance of the predecessor State's treaties", and "the evidence which they may contain of the views of States concerning the customary law governing succession of States in respect of treaties"); paras. (14) to (18) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 213-214 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule "in regard to a newly independent State's *obligation* to inherit treaties" and finding that States have not "in their practice acted on the basis that they are in general bound to [a predecessor's] treaties") (emphasis in original).

[85] See, for example, paras. (1) and (5) of the commentary to draft article 49 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 246 (referring to the prohibition of the use of force as laid down in the Charter of the United Nations); para. (51) of the commentary to the provisional version of

## D. Relevance of the practice of international organizations

### Observation 13

**Under certain circumstances, the practice of international organizations has been relied upon by the Commission to identify the existence of a rule of customary international law. Such reliance has related to a variety of aspects of the practice of international organizations, such as their external relations, the exercise of their functions, as well as positions adopted by their organs with respect to specific situations or general matters of international relations.**[87]

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draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, pp. 22-23), *Yearbook ... 1980*, vol. II (Part Two), p. 154 ("The current treaty practice of States indicates the application of provisions of several conventions of a universal character dealing with some special aspects of State immunity."); para. (5) of the commentary to article 11 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 34 (recognition of fair trial guarantees in numerous treaties).

[86] At times, the Commission appears to have inferred the general recognition or acceptance of a rule from certain international instruments other than treaties, including, for instance, resolutions and declarations by international organizations. See, for example, para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two), p. 161 (mentioning, inter alia, that the principle of the obligation to notify other States of a risk of significant harm "is embodied in a number of international agreements, ... declarations and resolutions adopted by intergovernmental organizations, conferences and meetings ..."; and the commentary to the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two): para. (16) of the commentary to article 2, p. 22 (indicating, inter alia, that the principle of international criminal responsibility for incitement was recognized in the Charter of the Nürnberg Tribunal); paras. (1) to (3) of the commentary to article 6, p. 25 (recognition of the principle of command responsibility in treaties and in the statutes of international criminal tribunals); para. (4) of the commentary to article 6, p. 27 (express recognition, in the statutes of international criminal tribunals, of the absence of a defence based on the official position of the offender); and para. (5) of the commentary to article 14, pp. 39-40 (referring to various instruments which do not recognize any defences to those crimes).

[87] See, for example, paras. (7) and (8) of the commentary to draft article 41 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), pp. 114-115 ("[7] An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990 ... [8] As regards the denial by a State of the right of self-determination of peoples, ... The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia and the Bantustans in South Africa."); para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two), p. 159 (indicating that the obligation to notify other States of the risk of significant harm is recognized in "declarations adopted by intergovernmental organizations, conferences and meetings"); para. (2) of the commentary to draft article 17 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 44 (indicating that the General Assembly had affirmed that crimes against humanity and genocide constituted crimes under international law, and had adopted the Convention on the Prevention and Punishment of the Crime of Genocide); *Yearbook ... 1974*, vol. II (Part One), paras. (1) to (14) of the commentary to draft article 4 on the succession of States in respect of treaties, pp. 177-180 (referring to the practice of numerous international organizations, including the United Nations and certain specialized agencies), paras. (12) and (13) of the commentary to draft article 8, pp. 184-185 (citing the Secretary-

**Observation 14**

**On some occasions, the Commission has referred to the possibility of the practice of an international organization developing into a custom specific to that organization. Such customs may relate to various aspects of the organization's functions or activities, e.g. the treaty-making power of an international organization or the rules applicable to treaties adopted within the organization.**[88]

## E. Relevance of judicial pronouncements and writings of publicists

30. As previously indicated,[89] the Commission has on many occasions considered judicial pronouncements and writing of publicists in its analysis of customary international law.[90] As described below, the Commission has relied upon these materials in various ways.

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General of the United Nations practice as depositary of multilateral treaties) and para. (3) of the commentary to draft article 16, p. 215 (same); para. (2) of the commentary to draft article 24 on the representation of States in their relations with international organizations, *Yearbook ... 1971*, vol. II (Part One), p. 301 ("The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized."); para. (1) of the commentary to draft article 49 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 246 ("... the clear-cut prohibition of the threat or use of force in Article 2(4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law."); and para. (112) of the commentary to principle VI of the principles of international law recognized in the charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook ... 1950*, vol. II, p. 376 (referencing a declaration concerning wars of aggression adopted by the Assembly of the League of Nations). See also para. 78 of the report of the International Law Commission on the work of its second session, *Yearbook ... 1950*, vol. II, p. 372 ("Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations.").

[88] See para. (14) of the commentary to draft article 7 on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol. II (Part Two), p. 27 (referring to the development of a practice into a "rule of the organization" recognizing the competence of the head of the Secretariat to express the consent of the organization to be bound by a treaty, without reference to another organ of the organization; also pointing out that "[i]t is the acquiescence of ['all the other organs of the organization that might have been entitled to claim the competence and did not do so'] which constitutes the practice"); paras. (11) to (13) of the commentary to draft article 4 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 180 (evoking, in general, the possibility that the internal practice of an international organization may give rise to organization-specific customary rules); and para. (2) of the commentary to draft article 22 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 233 (indicating that the International Labour Organization has a particular customary practice with respect to the date from which a newly independent State is regarded as bound to labour conventions).

[89] See observation 1 in section II.A of the present memorandum.

[90] Of potential general relevance to this section is the following comment made by the Commission in paragraph 30 of its report on ways and means for making the evidence of customary international law more readily available: "Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of

**Observation 15**

**The Commission has, on some occasions, relied upon decisions of international courts or tribunals as authoritatively expressing the status of a rule of customary international law.**[91]

**Observation 16**

**Furthermore, the Commission has often relied upon judicial pronouncements as a consideration in support of the existence or non-existence of a rule of customary international law.**

31. Where the Commission itself undertook an analysis for the purpose of identifying the existence of a rule of customary international law, judicial recognition has often constituted a relevant, if not decisive, consideration in support of the existence of the rule. Such recognition was found in decisions of international courts and tribunals as well as in arbitral awards.[92]

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customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts" (*Yearbook ... 1950*, vol. II, p. 368).

[91] For example, on the question of straight baselines, the Commission interpreted the International Court of Justice judgment in the *Fisheries* case between the United Kingdom and Norway "as expressing the law in force" and "accordingly drafted the article on the basis of [the] judgment" (paras. (1) to (4) of the commentary to draft article 5 on the law of the sea, *Yearbook ... 1956*, vol. II, pp. 267-268). See also paras. (3) to (5) of the commentary to draft article 24 (p. 277) (relying on the judgment of the Court in the *Corfu Channel* case as expressing the customary rule in force with regard to innocent passage through international straits connecting two parts of the high seas) and para. (2) of the commentary to draft article 23 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 211 (stating that "there is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*" and referring to decisions of the International Court of Justice, the Permanent Court of International Justice and arbitral tribunals).

[92] See, for example, *Yearbook ... 2001*, vol. II (Part Two), para. (14) of the commentary to draft article 25 on the responsibility of States for internationally wrongful acts, p. 83 ("On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25."), para. (6) of the commentary to draft article 41, p. 114 (quoting the *Military and Paramilitary Activities in and against Nicaragua* case and indicating that "the existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of [the] International Court of Justice") and para. (2) of the commentary to draft article 51, p. 134 (referring, inter alia, to the *Naulilaa* case concerning the requirement of proportionality for taking countermeasures); *Yearbook ... 1966*, vol. II, para. (4) of the commentary to draft articles 16 and 17 on the law of treaties, pp. 203-204 (referring to the International Court of Justice pronouncement in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case that "[t]he principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law."), paras. (14) and (15) of the commentary to draft article 27, pp. 221-222 (relying on the jurisprudence of international courts and tribunals to ascertain established rules of treaty interpretation) and para. (8) of the commentary to draft article 29, pp. 225-226 (analyzing whether or not the Permanent Court of International Justice, in its *Mavrommatis Palestine Concessions* case, intended to lay down a general rule regarding treaty interpretation in cases of divergence between authentic texts); para. (4) of the commentary to draft article 8 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 25 (referring to several

**Observation 17**

**At times, the Commission has also relied upon decisions of international courts or tribunals, including arbitral awards, as secondary sources for the purpose of identifying relevant State practice.**[93]

**Observation 18**

**The writings and opinions of jurists have often been considered by the Commission in the identification of rules of customary international law.**

32. In its consideration of the writings and opinions of jurists for the purpose of identifying a rule of customary international law, the Commission has, at times, undertaken an overall assessment of the weight of opinion in support of a particular

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decisions by international courts and tribunals, including the Franco-Italian Conciliation Commission's pronouncement that "customary international law has not established any autonomous criterion for determining what constitutes State property"); para. (19) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 34 ("Decisions of international jurisdictions confirm this rule."); paras. (3) to (8) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 197-199 (citing numerous decisions of international courts in its analysis of the question of territorial treaties, and indicating that a Permanent Court of International Justice pronouncement "is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates."); para. (18) of the commentary to draft article 3 on the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), p. 94 ("[T]he existence of the principle of law requiring consultations among States in dealing with fresh water resources is explicitly supported by the arbitral award in the *Lake Lanoux* case."); para. (3) of the commentary to draft article 17 of the draft Code of crimes against the peace and security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 44 ("[T]he principles underlying the [Genocide] Convention have been recognized by [the] International Court of Justice as binding on States even without any conventional obligation."); para. 6 of the commentary to draft article 18 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 48 ("The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the International Tribunal for the Former Yugoslavia."); and para. (1) of the commentary to draft article 3 on the expulsion of aliens, A/67/10, p. 22 ("The right to expel has been recognized in particular in a number of arbitral awards and decisions of claims commissions and in various decisions of regional courts and commissions.").
See also, generally, *Yearbook ... 1950*, vol. II, pp. 369-370, paras. (42) to (51) (reviewing the availability of publications containing decisions and awards of international courts and tribunals in a section entitled "Evidence of customary international law").

[93] See para. (23) of the commentary to draft articles 16 and 17 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 208 ("That the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the [International Court of Justice] itself in *Reservations to the Genocide Convention* case spoke of 'very great allowance' being made in international practice for 'tacit assent to reservations'."); para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), p. 98 (including "decisions of international courts and tribunals" in its "survey of all available evidence of the general practice of States, accepted as law"). See also para. (4) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 110 (relying on the *Delagoa Bay Railway* and the *S.S. "Wimbledon"* cases as evidence of "State practice" with respect to "[t]he relevance of the injured State's contribution to the damage in determining the appropriate reparation").

rule.[94] Such an assessment appears to have been based on both quantitative and qualitative aspects.[95]

33. On other occasions, the Commission has relied on the writings of jurists as secondary sources of State practice.[96]

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[94] See, for example, para. (2) of the commentary to draft articles 11 and 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 197 ("The weight of opinion amongst modern writers supports the traditional doctrine ... In general, however the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States ").

[95] See *Yearbook ... 1966*, vol. II, para. (8) of the commentary to draft article 49 on the law of treaties, p. 247 ("[T]he great majority of international lawyers to-day unhesitatingly hold that Article 2, paragraph 4, ..., authoritatively declares the modern customary law regarding the threat or use of force."), para. (2) of the commentary to draft article 53, p. 251 ("Some jurists ... take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. A number of other jurists, however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties."), para. (1) of the commentary to draft article 57, pp. 253-254 ("The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party ...") and para. (1) of the commentary to draft article 59, p. 257 ("Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned ..."); para. (9) of the commentary to draft article 17 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 46 ("The foregoing rule conforms to the opinions of publicists, who generally take the view that ..."), para. (3) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 211 ("The majority of writers take the view, supported by State practice, ..."); para. (15) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 213 ("Considerable support can be found among writers and in State practice for the view that general international law does impose an obligation ..."); and para. (1) of the commentary to draft article 3 on the expulsion of aliens, A/67/10, p. 22 ("[The right to expel] is uncontested in practice as well as in case law and the legal writings."). See also para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), p. 98 (referring in general terms to "the views of learned commentators") and paras. (3) to (5) of the commentary to draft article 32 on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 228-229 (finding that the division of opinion among jurists "was primarily of a doctrinal character" and "would be likely to produce different results only in very exceptional circumstances").

[96] See, for example, para. (3) of the commentary to draft article 32 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 94 (citing an example of relevant State practice found in an article by R. L. Buell in the *Political Science Quarterly*); para. (3) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 211 (citing *The Law of Treaties* by A. D. McNair and quoting a statement by the United Kingdom on Finland's position vis-à-vis its predecessor's treaties); para. (2) of the commentary to draft article 18 on diplomatic protection, A/61/10, p. 91 (citing writings of jurists in support of the proposition that "there is support in the practice of States, in judicial decisions and in the writings of publicists, for the position that the State of nationality ... may seek redress for members of the crew of the ship who do not have its nationality"; and para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II (Part Two), p. 98 (including "the views of learned commentators" in "[a] survey of all available evidence of the general practice of States, accepted as law").

# III. Operation of customary international law in the international legal system

34. This section includes observations regarding the Commission's apparent understanding of the binding nature and characteristics of the rules of customary international law, and of the relationship of customary international law with other international legal rules.

## A. Binding nature and characteristics of the rules of customary international law

### Observation 19

**The Commission has consistently referred to customary international law as a set of rules generally binding on subjects of international law.[97] On several occasions, the Commission has opposed such rules to treaty rules, which, by definition, only bind the parties to the treaty.[98]**

### Observation 20

**Reference was made in the work of the Commission to the possible existence of rules of regional customary international law.[99] In this regard, the question of whether a regional customary law rule would be binding on a State that has not specifically adopted or accepted it was also alluded to.[100] Furthermore, the Commission has referred to the possible**

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[97] See, for example, paras. (1) to (4) of the commentary to draft article 34 on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 230-231 (excerpts reproduced in note 124 below) and para. (30) of the commentary to draft article 12 and para. (8) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 204 and 212, respectively. See also note 133 below. In its Guide to Practice on Reservations to Treaties, the Commission has alluded to the so-called theory of the "persistent objector", according to which a rule of customary international law would not be opposable to a State that has persistently objected to the rule during its formation; see para. (7) of the commentary to guideline 3.1.5.3 on reservations to treaties, A/66/10/Add.1, p. 371. In so doing, the Commission appears to have excluded the operation of any such theory with respect to rules of *jus cogens*; see para. (19) of the commentary to guideline 3.1.5.3, A/66/10/Add.1, p. 375.

[98] See, for example, paras. (1) to (4) of the commentary to draft article 34 on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 230-231; para. (2) of the commentary to draft article 5 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 181 (referring to "obligations to which [a State] would be subject under international law independently of the treaty"); para. (30) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 204 ("While recognizing that an objective régime may arise from such a treaty, [the Commission] took the view that the objective régime resulted rather from the execution of the treaty and the grafting upon the treaty of an international custom."); and para. (7) of the commentary to guideline 3.1.5.3 on reservations to treaties, A/66/10/Add.1, p. 370 ("Customary rules are binding on States, independently of their expression of consent to a treaty rule..."). See, however, section III.B below concerning the relationship between treaty rules and customary international law.

[99] See the report of the Study Group of the International Law Commission on fragmentation of international law, A/CN.4/L.682, paras. 213-215.

[100] Ibid., para. 213 ("A separate, much more difficult case is the one where it is alleged that a regional rule (either on the basis of treaty practice or custom) is binding on a State even when the State has not specifically adopted or accepted it. This is the claim dealt with (albeit

**existence of special rules, including customary rules or historic rights, governing the delimitation of certain maritime areas[101] or establishing a specific territorial, fluvial or maritime regime.[102]**

**Observation 21**

**The Commission has, on certain occasions, referred to the existence of rules of customary international law that are regarded as giving rise to so-called "*erga omnes* obligations".[103]**

**Observation 22**

**The Commission has, on various occasions, referred to the existence of rules of customary international law[104] that, by reason of their subject matter, are of a non-derogable character (peremptory norms/*jus cogens*).**

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inconclusively) by the International Court of Justice in the *Asylum* (1950) and *Haya de la Torre* (1951) cases.").

[101] See para. (6) of the commentary to draft article 12 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 271 (acknowledging to the possible existence of "special rules" and alluding to the possibility of "differences in customary law" in the field of maritime delimitation). See also para. (4) of the commentary to draft article 3 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 266 ("A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes*, by any State, if based on historic rights.").

[102] See para. (1) of the commentary to draft article 34 on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 230-231 ("The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom."). See also para. (8) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), pp. 189-199 (referring to the case made in the *Right of passage* case (*I.C.J. Reports* 1960, p. 6) for the proposition that a territorial right of passage may exist as a local or bilateral custom).

[103] See, in particular, para. (9) of the commentary to draft article 48 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 127 ("While taking up the essence of this statement [the dictum of the International Court of Justice in the *Barcelona Traction* case concerning obligations *erga omnes*], the articles avoid use of the term 'obligations *erga omnes*', which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to 'the outlawing of acts of aggression, and of genocide' and to 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list."). See also the commentary to draft article 49 on the responsibility of international organizations, A/66/10, pp. 145-148.

[104] Article 53 of the Vienna Convention on the Law of Treaties defines a *jus cogens* rule as a "peremptory norm of *general international law*" (emphasis added). The Commission has indicated, in para. (14) of its commentary to guideline 3.1.5.3 on reservations to treaties, that a peremptory norm of general international law "is, in almost all cases, customary in nature" (A/66/10/Add.1, p. 374), while also acknowledging that "the wording of article 53 of the 1969 and 1986 Vienna Conventions does not exclude the possibility that a treaty rule may, by itself, be a peremptory norm." (A/66/10/Add.1, note 1712).

35. The Commission has indicated that "the concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine".[105] Examples of peremptory norms presented by the Commission as generally recognized as such include the prohibition of aggression;[106] the prohibitions against slavery and the slave trade, genocide, racial discrimination and apartheid;[107] as well as the prohibition against torture and the obligation to respect the right of self-determination.[108] The Commission emphasized, however, the non-exhaustive character of any such list.[109]

36. It should be recalled that the Commission, in its draft articles on the law of treaties, proposed several provisions relating to *jus cogens*.[110] The Commission has, on multiple occasions, asserted that a treaty rule that conflicts with *jus cogens* is (or becomes) invalid.[111] Furthermore, the Commission has recognized that the peremptory character of a rule of customary international law also affects the operation of certain secondary rules relating to the responsibility for internationally wrongful acts.[112]

**Observation 23**

**The Commission has indicated that peremptory norms are formed as a result of a process of widespread acceptance and recognition of such norms as peremptory by the international community as a whole.**[113]

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[105] Para. (2) of the commentary to draft article 40 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 112.

[106] Ibid., para. (4) of the commentary to draft article 40.

[107] Ibid.

[108] Ibid., para. (5), p. 113.

[109] Ibid., para. (6). In the same passage the Commission also recalls the possibility that new peremptory norms may come into existence as contemplated in article 64 of the 1969 Vienna Convention on the Law of Treaties.

[110] See draft articles 41(5), 50, 61 and 67 on the law of treaties and commentaries thereto; *Yearbook ... 1966*, vol. II, pp. 238-239, 247-249, 261 and 266-267, respectively.

[111] See *Yearbook ... 1966*, vol. II, draft article 50 on the law of treaties and commentary thereto, pp. 247 ff. (draft article 50 reads: "A treaty is void if its conflicts with a peremptory norm of general international law..."); see also para. (8) of the commentary to draft article 41, p. 239, and para. (1) of the commentary to draft article 61, p. 261 ("Manifestly, if a new rule of that character — a new rule of *jus cogens* — emerges, its effect must be to render void not only future but existing treaties."). As regards the consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law, see draft article 67 on the law of treaties and commentary thereto (*Yearbook ... 1966*, vol. II, pp. 266-267). Similarly, the Commission has stated, in guiding principle 8 applicable to unilateral declarations of States capable of creating legal obligations, that "[a] unilateral declaration which is in conflict with a peremptory norm of general international law is void" (A/61/10, p. 378).

[112] See draft articles 26 (with regard to *jus cogens* in relation to circumstances precluding wrongfulness), 40 and 41 (content of the international responsibility in the case of serious breaches of obligations under peremptory norms of general international law) and 50 (obligations not affected by countermeasures) on the responsibility of States for internationally wrongful acts, and commentaries thereto, *Yearbook ... 2001*, vol. II (Part Two), pp. 84-85, 112-116 and 131-134. See also draft articles 26, 41, 42 and 53 on the responsibility of international organizations, and commentaries thereto, A/66/10, pp. 120-121, 133-136 and 153-154.

[113] Regarding this substantive requirement of general acceptance and recognition, see, in particular, para. (7) of the commentary to draft article 12 on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 56 ("Even fundamental principles of the

**Observation 24**

**While stating that a rule of *jus cogens* "can be modified only by a subsequent norm of general international law having the same character",[114] the Commission has indicated that, at the present time, a modification of a rule of *jus cogens* would most probably be effected through a general multilateral treaty.[115]**

## B. Relationship of customary international law with treaties

37. The question of the relationship of customary international law with treaties was addressed in general terms in draft article 34 on the law of treaties, which provided as follows:

*Article 34. Rules in a treaty becoming binding through international custom*

Nothing in articles 30 to 33 [provisions relating to treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.[116]

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international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community"). See also, on this point, *Yearbook ... 2001*, vol. II (Part Two), para. (5) of the commentary to draft article 26 on the responsibility of States for internationally wrongful acts, p. 85, and para. (6) of the commentary to draft article 40, p. 113 (referring to the formation of new peremptory norms through the process of acceptance and recognition by the international community of States as a whole). It should be noted that, while draft article 50 on the law of treaties (*Yearbook ... 1966*, vol. II, p. 247) and draft 53 on the law of treaties between States and international organizations or between international organizations (*Yearbook ... 1982*, vol. II (Part Two), p. 56) refer in this context to "the international community of States as a whole", the draft articles on the responsibility of States for internationally wrongful acts (draft articles 25, 33, 42 and 48; *Yearbook ... 2001*, vol. II (Part Two)) and the draft articles on the responsibility of international organizations (draft articles 25, 33, 43 and 49; A/66/10, para. 87) refer more generally to "the international community as a whole".

[114] See, in this regard, draft article 50 *in fine* on the law of treaties (*Yearbook ... 1966*, vol. II, p. 247) as well as draft 53 *in fine* on the law of treaties between States and international organizations or between international organizations (*Yearbook ... 1982*, vol. II (Part Two), p. 56). This phrase was included in article 53 of the 1969 and 1986 Vienna Conventions. On the "strength" of *jus cogens* norms, see also para. (3) of the commentary to guideline 4.4.3 on reservations to treaties, A/66/10/Add.1, p. 502 ("... doubtless the rules of *jus cogens* will continue to evolve, but it seems unlikely that a reservation can contribute to destabilizing a norm presenting such a degree of binding force").

[115] See, on this point, para. (4) of the commentary to draft article 50 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 248: "[I]t would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As a modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty, the Commission thought it desirable to indicate that such a treaty would fall outside the scope of the article."

[116] *Yearbook ... 1966*, vol. II, p. 182.

38. The commentary to that draft article contained, inter alia, the following observations:

> "(1) The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom, rules of land warfare, the agreements for the neutralization of Switzerland, and various treaties regarding international riverways and maritime waterways. So too a codifying convention purporting to state existing rules of customary law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the convention.
>
> "(2) In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty. For this reason the Commission did not think that this process should be included in the draft articles as a case of a treaty having legal effects for third States. It did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33, it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law."[117]

39. The substance of draft article 34 was subsequently retained in article 38 of the 1969 Convention on the Law of Treaties,[118] where the words "recognized as such" were added to qualify the rule of customary international law referred to in the provision.[119] Article 38 on the law of treaties between States and international organizations or between international organizations, adopted by the Commission in 1982, which later became article 38 of the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations,[120] reiterated this provision, including the additional phrase introduced at the 1969 Vienna Conference.[121]

40. In considering the various topics on its agenda, the Commission has addressed a number of aspects regarding the relationship of customary international law with treaties, as summarized in the following observations.

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[117] Ibid., pp. 230-231.

[118] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[119] This additional phrase was introduced on the basis of an amendment by the Syrian Arab Republic; see United Nations Conference on the Law of Treaties (1968-1969), *Official Records, Documents of the conference*, A/CONF.39/11/Add.2, p. 155, paras. 311-312.

[120] This Convention is not yet in force; see *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations. Vienna, 18 February-21 March 1986*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.94.V.5), document A/CONF.129/15.

[121] *Yearbook ... 1982*, vol. II (Part Two), pp. 47-48.

**Observation 25**

**Recognizing that a treaty may codify existing rules of customary international law,[122] the Commission has often referred to treaties as possible evidence of the existence of a customary rule.[123]**

**Observation 26**

**While indicating that a treaty does not itself bind third States,[124] the Commission has, on several occasions, recognized that treaties may contribute to the crystallization[125] or development[126] of a rule of**

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[122] See, in general terms, *Yearbook ... 1950*, vol. II, report of the International Law Commission to the General Assembly, para. 29 ("Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law.").

[123] See sections II.B.2 and II.C.2 of the present memorandum concerning treaties as evidence of State practice and/or *opinio juris*. However, the Commission has also pointed to a divergence between a conventional regime and the applicable customary international law; see para. (8) of the commentary to article 8 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 29 (referring to the crime of genocide as "a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein [namely in its Article 6 which restricts national court jurisdiction for genocide to the State in whose territory the crime occurred]").

[124] See, in particular, paras. (1) to (4) of the commentary to draft article 34 on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 230-231 (in particular, (1) "*The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized.* A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom ... *So too a codifying convention may come to be regarded as the generally accepted formulation of the customary rules* in question even by States not parties to the convention ... [2] *In none of these cases, however can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty a: binding customary law.* In short, for these States the source of the binding force of the rules is custom, not the treaty ...") (emphasis added). This point was addressed in similar terms in para. (30) of draft article 12 on the succession of States in respect of treaties and in para. (8) of the commentary to draft article 15 on that same topic; see *Yearbook ... 1974*, vol. II (Part One), pp. 204 and 212, respectively.

[125] See para. (11) of the commentary to guideline 3.1.5.3 on reservations to treaties, A/66/10/Add.1, p. 373 ("... a 'codification convention' often crystallizes as rules of general international law rules which did not have that status at the time of its adoption").

[126] See, for example, para. (34) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 205 (referring to a right of free passage through the Suez Canal "whether by virtue of the treaty or of the customary regime which developed from it"); and para. (3) of the commentary to draft article 18 on the law of transboundary aquifers, A/63/10, p. 78 ("[The 'Martens clause'], which was originally inserted in the Preamble of the Hague Conventions of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, now has the status of general international law."). As

**customary international law. The Commission, however, has found that the frequent enunciation of a provision in international treaties did not necessarily indicate that the provision had developed into a rule of customary international law.**[127]

**Observation 27**

**The Commission has alluded to the possibility that the emergence of a new rule of customary international law may modify a treaty, depending on the particular circumstances and the intentions of the parties to the treaty.**[128]

**Observation 28**

**The Commission has recognized that, with the exception of *jus cogens* norms,**[129] **States may depart from rules of customary international law through the conclusion of bilateral or multilateral agreements.**[130] **At the same time, the Commission has emphasized that a treaty, except where it provides otherwise, must be interpreted and applied in the light of existing rules of international law, including customary law.**[131]

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an illustration of the possible impact of the adoption of a conventional rule on the Commission's views on a legal matter, see para. (5) of the commentary to draft article 11 on special missions, *Yearbook ... 1967*, vol. II, p. 353 ("A rule frequently observed in practice is that the receiving State must ensure the possibility of [the local] recruitment [of staff required for special missions], which is often essential for the performance of the special mission's functions. In 1960 the Commission inclined to the view that this rule conferred a genuine privilege on the special mission. *In the light of the two Vienna Conventions, however, the Commission changed its opinion and in 1965 adopted the principle stated in article 10, paragraph 2 of this draft* [stating that 'Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.']") (emphasis added).

[127] See para. (3) of the commentary to draft article 7 on most-favoured-nation clauses, *Yearbook ... 1978*, vol. II (Part Two), p. 25 ("Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.").

[128] See para. (3) of the commentary to draft article 38 (Modification of treaties by subsequent practice) on the law of treaties, *Yearbook ... 1966*, p. 236 ("As to the case of modification through the emergence of a new rule of customary law, [the Commission] concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties."). This comment was made in relation to the Commission's explanation of its decision to remove, in the final version of the draft article, a subparagraph that appeared in draft article 68 of the 1964 draft and provided that "[a] treaty may be modified ... (ii) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties". For the commentary to the latter provision, see *Yearbook ... 1964*, vol. II, p. 198, para. (3). As is well known, the proposed draft article 38 was not retained by the 1969 Vienna Conference.

[129] See section III.A of the present memorandum.

[130] See, for example, para. (15) of the commentary to draft article 17 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 47 ("It is obviously within the discretion of States to conclude treaties making exceptions to a principle.") and para. (2) of the commentary to draft article 30 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 289 (alluding to the possibility of treaty-based policing rights being granted to warships in respect of foreign ships, thus departing from customary international law).

[131] See, for example, para. (3) of draft article 60 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 293 ("The existing rule of customary law by which nationals of other States are at liberty to

## C. Relationship of customary international law with "general international law"

### Observation 29

**In certain instances, the Commission has employed the phrase "general international law" to refer, in a generic manner, to rules of international law other than treaty rules.[132] Also, on some occasions, the Commission appears to have used "general international law" and "customary international law" interchangeably.[133] The phrase "general international law" has also been used by the Commission as an umbrella term that includes both customary international law and general principles.[134]**

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engage in such fishing on the same footing as the nationals of the coastal States should continue to apply. The exercise of other kinds of fishing in such areas must not be hindered except to the extent strictly necessary for the protection of the fisheries contemplated by the present article."), para. (1) of the commentary to draft article 24 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 211 (referring to the "general rule ... that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms")

[132] See, for example, para. (2) of the commentary to draft article 30 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 289 (indicating that the regulations contained in treaties granting certain policing rights to warships in respect of foreign ships could not yet be regarded as part of "general international law"), the comment made by the Commission with respect to the provisions of the preamble of the Model rules on arbitral procedure, *Yearbook ... 1958*, vol. II, p. 86, para. 24 (those provisions ... "govern it as principles of general international law rather than as deriving from the agreement of the parties"), draft article 1 (b) on the prevention or punishment of crimes against diplomatic agents and other internationally protected person, *Yearbook ... 1972*, vol. II, p. 312 ("['Internationally protected person' means] [a]ny official of either a State or an international organization who is entitled, *pursuant to general international law or an international agreement*, to special protection ..." (emphasis added)); para. (8) of the commentary to that draft article, *Yearbook ... 1972*, vol. II, p. 314 ("The expression 'general international law' is used to supplement the reference to 'an international agreement' ..."), para. (3) of the commentary to draft article 18 on the law of transboundary aquifers, A/63/10, p. 78 ("[The 'Martens clause'], which was originally inserted in the Preamble of the Hague Conventions of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, now has the status of general international law."), para. (2) of the commentary to draft article 10 on the effects of armed conflicts on treaties, A/66/10, p. 191; para. 4 of the commentary to draft article 14 on the expulsion of aliens, A/67/10, p. 42 ("It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue of general international law.") and, similarly, the commentary to draft article 25 on the expulsion of aliens, A/67/10, p. 62.

[133] See, for example, the following passages of the commentary to draft article 49 on the law of treaties, *Yearbook ... 1966*, vol. II, pp. 246-247 ("[1] The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2(4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law ... [5] *The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are to-day of universal application* ... [8] ... As pointed out in paragraph (1) above, the invalidity of a treaty procured by illegal threat or use of force is a principle which is *lex lata* ... *[T]he great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force*." (emphasis added))

**Observation 30**

**On some occasions, the Commission has referred to general principles of law — possibly within the meaning of Article 38, para. (1) (c) of the Statute of the International Court of Justice[135] — or to so-called general principles of international law.[136] The Commission has also indicated that such general principles may inform the international regulation of particular subjects[137] or even the international legal system as a whole.[138]**

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[134] See the explanations contained in the report of the Study Group of the International Law Commission on fragmentation of international law, A/CN.4/L.682, para. 194(2)(a) ("*General international law (that is, general custom and general principles of law)* fulfils gaps in the special regime and provides interpretative direction for its operation" (emphasis added)) and para. 493(3) ("'General international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations' under article 38 (1) (c) of the Statute of the International Court of Justice. But it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars*, *in dubio mitius*, estoppel and so on). In the practice of international tribunals, including the Appellate Body of the WTO or the European and Inter-American Courts of Human Rights reference is constantly made to various kinds of 'principles' sometimes drawn from domestic law, sometimes from international practice but often in a way that leaves their authority unspecified.")

[135] See, for example, para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook ... 1966*, vol. II, p. 257 (principle of *rebus sic stantibus*); para. (1) of the commentary to draft article 7 on the nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), p. 30 ("The Commission recognizes that one of the general principles of law is the principle of non-retroactivity of legislation."); and para. (3) of the commentary to article 14 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 39 (explaining that "the possible defences to crimes covered by the Code [are] those defences that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law"). For additional examples, see footnote 137 below.

[136] See, for example, *Yearbook ... 1949*, p. 290, para. 52 (explaining that the articles of the draft declaration on the rights and duties of states enunciate "general principles of international law"), para. (8) of the commentary to article 68 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 298 ("[The principle of the sovereign rights of the coastal State], which is based on general principles corresponding to the present needs of the international community, is in no way incompatible with the principle of the freedom of the seas."). See also the following two footnotes.

[137] Both general principles of law and general principles of international law have been referred to in this context. As regards general principles of law, see, in particular, para. (1) of the commentary to draft article 7 on the nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), p. 30 (referring to non-retroactivity of legislation as a general principle of law that has "an important role to play" as regards nationality issues), article 14 of the draft Code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 39 ("The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime."), para. (1) of the commentary to draft article 3 on the prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two), p. 153 ("Article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration ...") (footnote omitted).
Concerning general principles of international law, see, in particular, para. (8) of the commentary to draft article 3 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 266 ("It follows from the foregoing that the Commission came out clearly against claims to extend the territorial sea to a breadth which, in its view, jeopardizes the principle that has governed maritime law since Grotius, namely, the freedom of the high seas."), para. (1) of the commentary to draft

**Observation 31**

**Furthermore, in the work of the Commission, the phrase "general international law" was also used to refer to general rules of international law as opposed to rules pertaining to specific fields which include, inter alia, human rights law, environmental law, the law of the sea, etc.**[139]

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article 27 on the law of the sea, *Yearbook ... 1956*, vol. II, p. 278 ("The principle generally accepted in international law that the high seas are open to all nations governs the whole regulation of the subject."), the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": see *Yearbook ... 1991*, vol. II (Part Two), pp. 22-23), *Yearbook ... 1980*, vol. II (Part Two), p. 144, para. (12) ("That rationale of sovereign immunity appears to rest on a number of basic principles, such as common agreement or usage, international comity or courtesy, the independence, sovereignty and dignity of every sovereign authority, representing a progressive development from the attributes of personal sovereigns to the theory of equality and sovereignty of States and the principle of consent."), and *Yearbook 1980*, vol. II (Part Two), p. 156, para. (55) (discussing the "rational bases of State immunity" and referring to "the sovereignty, independence, equality and dignity of States" as notions that "seem to coalesce, together constituting a firm international legal basis for State immunity").

[138] See, in this regard, the following observation made by the Commission concerning the draft declaration on the rights and duties of States:

> In conclusion it will be observed that the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic right and duties. *The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules.* Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in proclaiming "the supremacy of international law". (emphasis added) (*Yearbook ... 1949*, p. 290, para. 52).

See also para. (2) of the commentary to draft article 4 on the prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two), p. 156 (referring to the principle of good faith as covering "the entire structure of international relations" (citing R. Rosenstock, "The declaration of principles of international law concerning friendly relations: a survey", *American Journal of International Law*, vol. 65 (1971), p. 734)); as well as the observations made by the Commission with regard to the most-favoured-nation clause and the principle of non-discrimination, *Yearbook ... 1978*, vol. II (Part Two), p. 11, para. 48 ("The Commission recognized several years ago that the rule of non-discrimination 'is a general rule which follows from the equality of States', and that non-discrimination is 'a general rule inherent in the sovereign equality of States' ...") and p. 12, para. 50 (referring to "the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature").

[139] See, in particular, the report of the Study Group of the International Law Commission on fragmentation of international law, A/61/10, para. 243 ("The fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such highly specialized forms of knowledge as 'investment law' or 'international refugee law', etc. — each possessing their own principles and institutions."). See also para. 251 (10), note 1017 ("There is no accepted definition of 'general international law'. For the purposes of these conclusions, however, it is sufficient to define what is 'general' by reference to its logical counterpart, what is 'special'.").